U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 06 December 2004

In the Matter of

Joseph A. Stepek,
Claimant

v.

Ceres Terminal, Inc.,
Employer/Carrier.

Case No.: 2004-LHC-00798

DECISION AND ORDER AWARDING BENEFITS[1]

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (hereinafter "the Act"). A hearing was held before me in Baltimore, Maryland on August 10, 2004, at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Claimant's Exhibits 1-24, Employer's Exhibits 1-56, and ALJ Exhibits 1-4 were admitted into evidence. At the close of the hearing, I allowed the Claimant thirty days to submit a response by the Claimant's vocational expert, Mr. Charles Smolkin (CX 25), to the updated report of the Employer's vocational expert, Ms. Camilla Mason, dated August 2, 2004. *See Stepek v. Ceres Terminal, Inc.*, 2004-LHC-00798, Order Closing Record and Establishing Briefing Schedule (ALJ Sept. 21, 2004). In addition, Employer submitted an additional report from Ms. Mason, dated September 9, 2004, in which she addressed the availability of the positions identified in her labor market survey (EX 57). I admitted CX 25 in its entirety, and admitted EX 57, with the caveat that those portions of EX 57 that go beyond Claimant's hearing testimony will not be considered.[2]

In an Order Establishing Briefing Schedule dated September 21, 2004, I gave the parties 30 (thirty) days to submit post-hearing briefs addressing the issues raised by the Claimant's claim. At the request of Claimant's counsel, and without objection from opposing counsel, I

[1] Citations to the record of this proceeding will be abbreviated as follows: "Tr." refers to the Hearing Transcript; "CX" refers to Claimant's Exhibit; and "EX" refers to Employer's Exhibit.

[2] In a subsequent Order Regarding Exhibits dated October 6, 2004, I again specifically stated that Ms. Mason's discussion of positions in her final report that are not included in the Claimant's testimony are not admitted. Thus, any reference to the following positions in Ms. Mason's September 9, 2004 report have been admitted into the evidentiary record: (1) Advanced Auto Parts counterperson on Patapsco Ave.; (2) Burger King cashier on Liberty Road; and (3) Taco Bell cashier on West Baltimore Street.

extended the briefing deadline to December 1, 2004. The Employer filed its post-hearing brief on October 14, 2004; Claimant filed his post-hearing brief on November 15, 2004. I have reviewed and considered these briefs in making my determination in this matter.[3]

I. Statement of the Case

Hearing Testimony

Testimony of the Claimant

Claimant was born on August 2, 1945, and was 59 years of age at the time of the hearing. He did not complete the 8th grade, and testified that he has average reading, writing, and mathematical skills. (Tr. 22). On July 12, 2000, the date of the subject accident or injury, the Claimant was working for Ceres Terminal, Inc. (hereinafter "Employer"). While employed by Ceres, Claimant worked at the CSX Rail Terminal, where he was a heavy machinery operator, responsible for loading and unloading cargo to and from the trains and terminal grounds. (Tr. 23). Since 1996, Claimant operated a crane, and occasionally a fifth-wheel or hustler machine for the Employer. (Tr. 23). As of the date of his retirement on September 29, 2003, Claimant had worked for the Employer for 24 years.

As a crane operator, Claimant was responsible for discharging and loading cargo onto and off of the trains in the rail yard. (Tr. 25). Once the cargo was removed from the train, a fifth-wheel driver moved and parked the cargo wherever there was room in the rail yard, and vice versa. (Tr. 25). According to Claimant, the cargo lifted from the trains eventually goes either out of the gate surrounding the rail yard, or out the back gate of the yard to the ships, which are roughly 200 feet from the back gate of the rail yard. Similarly, Employer's crane operators were responsible for loading trains with cargo that had occasionally come from the ships parked at the docks. (Tr. 25-26). During cross-examination, Claimant clarified that he did not load or unload cargo directly to or from the ships, but rather between the trains and areas within the rail yard. (Tr. 59).

The rail yard at which Claimant performed his duties for Employer contains four tracks and two cranes, and is part of the Sea Girt Marine Terminal along the waterfront in Baltimore, Maryland. (Tr. 24). The terminal is full of longshoremen, train operators, and train maintenance personnel. According to the Claimant, the longshoremen are responsible for loading and unloading the trains that come into the yard. The rail yard, which is owned by the State of Maryland and leased to CSX, is fenced off from the rest of the waterfront, and has been ever since September 11, 2001 for security purposes. (Tr. 60).

On July 12, 2000—the date of the incident at issue here—Claimant was driving a fifth-wheel for Employer during an extra shift. (Tr. 27). While he was unloading a bare chassis from the train, one of the hoses attached to the chassis broke off and went through the cockpit, striking

[3] After the submission of briefs, counsel for both parties submitted correspondence disputing claims in the Claimant's brief. As I have found that the Claimant cannot return to his usual job as a longshoreman, most of this dispute is moot. To the extent that either party is attempting to introduce new evidence, by "judicial notice" or otherwise, I have not taken any such new factual allegations into account in making my decision.

the Claimant's right leg, right arm, and right shoulder. (Tr. 28). Although in pain, Claimant decided to stay at work for the second shift. Later that evening his arm "blew up very bad." (Tr. 28). Claimant went home to ice it down. The next day, Claimant went to the emergency room at the Johns Hopkins Clinic at Bayview.

Before the incident on July 12, 2000, Claimant injured his right arm on two separate occasions while working for the Employer. In 1987, Claimant first injured his right arm when a crane hatch cover fell on his arm while he was at work. (Tr. 28-29). According to Claimant, Dr. Halleckman later performed a carpel tunnel operation. Claimant settled his workers' compensation claim related to the 1987 injury in 1989, and he returned to work shortly thereafter. Then, in 1994, Claimant injured himself while moving cargo in the rain, when the straps securing a steel load on a fifth-wheel hustler snapped, causing the steel to go through the train door. The wires securing the steel snapped back at the Claimant and "went through [his right] arm." (Tr. 29).[4] Claimant pulled the wire out of his arm, wrapped it up, and received medical treatment in "the shed." The next day, Claimant's arm was swollen and he "had no feeling in [his] whole arm." (Tr. 29). Dr. Halleckman operated again.

When asked at the hearing about the condition of his right arm before the July 12, 2000 injury, Claimant approached the bench in order to display his arm to the Court. While in front of the bench, Claimant indicated scar tissue from his surgeries, and skin graphs on the top and bottom of his right arm and in his right palm. (Tr. 30). Claimant also indicated that his right ring and little fingers cannot move, and his right hand is often "ice cold" to the touch. (Tr. 31).

According to Claimant, he had no problems feeling or moving the third and fourth fingers on his right hand before the July 12, 2000 injury. (Tr. 32). It was not until after the 2000 injury that those two fingers became numb and fixed. (Tr. 33). Claimant further testified that between the time of the 2000 injury and the time of his retirement, he was able to operate a crane without much difficulty, but he could not operate a yard hustler at all. (Tr. 33). Now, according to Claimant, he cannot operate a crane at a level expected of him at work because operating a crane requires the use of both hands to operate the levers on both sides of the cockpit. (Tr. 33).

When Claimant first told Employer about his right arm, Employer attempted to accommodate by offering Claimant rest periods if his arm swelled. (Tr. 35-36). Nevertheless, the Claimant's right arm swelled and he went back to Dr. Zimmerman. Claimant testified that Dr. Zimmerman then wrote a letter to the Employer asking that they not send the Claimant back to see him because there was nothing more he could do for the Claimant. (Tr. 35). Then, according to Claimant, the Employer sent him to more physicians for a variety of tests, but none of them could pinpoint the problem causing Claimant's ailments. (Tr. 35). At one point, Claimant visited Drs. Shetty and Carlton at the request of the Employer. (Tr. 36). According to Claimant, Drs. Shetty and Carlton told him he could no longer work as a longshoreman. (Tr. 36).

[4] The record contains the LS-202 form completed in conjunction with Claimant's right forearm injury. However, the form indicates that the injury occurred on November 24, 1992, while another LS-202 form indicates that the Claimant injured his right shoulder on April 29, 1994 when the door on a fifth-wheel fell and struck him on the shoulder. (EX 8).

In March of 2003, Claimant noticed that his right arm "started getting really really bad." (Tr. 34). As a result, he could only work for an hour or two before it swelled to the point he could not use it at all. (Tr. 34). Claimant continually complained to his superintendent, who sent him to see Dr. Zimmerman. According to Claimant, most physicians, including Dr. Zimmerman, could not pinpoint the cause of his swelling and infections, but would prescribe antibiotics. However, Claimant was told the infections were the result of overuse of his injured right arm. (Tr. 34-35). For fear of building up a tolerance to the antibiotics prescribed to treat the continued infections, Claimant, at the suggestion of his physician, retired from his employment with Ceres. (Tr. 35-36).

Before the 2000 injury, Claimant also experienced some pain in his right shoulder. In 1999, Claimant saw Dr. Matz, who reported that Claimant had full range of motion in the right shoulder. (Tr. 44). Now, according to the Claimant, he has very limited range of motion to the point he cannot comb his hair with his right hand. (Tr. 45). Dr. Riederman told Claimant he had an impingement syndrome in his right shoulder, and prescribed physical therapy. (Tr. 43).

Since retiring, Claimant's physical abilities are limited. He cannot drive a car for long periods. Any repetitive movement or activity with his right arm, including forward reaching, causes him pain and swelling. (Tr. 37; 64). According to the Claimant, the Functional Capacity Evaluation performed by a physical therapist indicates he could not now perform more than 20 to 30 "lifts" per shift operating a crane for Employer. (Tr. 38). Claimant testified, however, that when he was healthy he could perform 20 to 30 lifts per hour; anything less and Claimant would be replaced on the job. (Tr.38-39). In fact, Claimant attempted to operate a crane and a fifth-wheel during the last few months before he retired, but he would fall too far behind due to his frequent rests. (Tr. 40). At one point after the 2000 injury, Claimant demonstrated the level at which he could operate a fifth-wheel in front of his supervisor Ed Fox. Claimant testified, "They were amazed how bad [my arm] would blow up, just shifting gears." (Tr. 53).

Claimant also testified that he takes OxyContin at night, and on rainy days when his pain is the worst. (Tr. 40-41). Before the 2000 injury, Claimant had some pain in his right arm, but it was nothing he could not control; he was never hospitalized for the pain or cellulitis. (Tr. 64). Since the 2000 injury, however, Claimant claims he had pain and swelling after repetitive activities, worse during the night shift, when it was damp outside. (Tr. 41). In total, Claimant had six surgeries on his right arm before July 12, 2000. (Tr. 58-59).

Testimony of Anthony Buccini

Mr. Anthony Buccini testified at the hearing on behalf of the Employer. (Tr. 79). He is the operations manager for the Ceres Marine Terminals, including the CSX rail yard where Claimant worked for Employer. According to Mr. Buccini, the longshoremen at the CSX Railhead, who are members of ILA Local 333 or 953, are responsible for loading and unloading cargo to and from trains and trucks. (Tr. 80). At times, workers for another company (P&O Ports) bring cargo from the Sea Girt Terminal to the back gate of the rail yard; but according to Mr. Buccini the cargo brought into the rail yard from P&O makes up a "low volume, maybe one percent" of the total cargo at the rail yard. (Tr. 80). Mr. Buccini explained that to his knowledge, no containers are ever taken off of a train in the rail yard and then end up on the

ships. (Tr. 81). However, when pressed on cross-examination, Mr. Buccini admitted that he does not actually know the origin of the cargo handled by the Employer at the CSX Railhead, or where it goes. (Tr. 92). Mr. Buccini testified, nevertheless, that all cargo leaving the CSX Railhead leaves either by truck or by train. (Tr. 93).

During direct examination, Mr. Buccini was also asked about Claimant's condition and his specific duties in the last year of his employment with Employer. As operations manager, Mr. Buccini was responsible for assigning Claimant to his particular jobs. (Tr. 82). On cross-examination, Mr. Buccini admitted that he did not see the Claimant every day at work. (Tr. 86). But when he did see Claimant at work, he noticed Claimant's right arm was swollen on numerous occasions, which Mr. Buccini attributed to the times Claimant operated a fifth-wheel. (Tr. 87). Mr. Buccini testified that on April 3, 2003, Claimant had signed up to operate a fifth-wheel, after working a shift as a crane operator. Mr. Buccini was aware of Claimant's injured right arm. In fact, Mr. Buccini testified that Claimant had been having problems with his right arm for as long as he had known him, and he saw Claimant's right arm swell up after he performed any task "other than the crane operator's job," including during shifts before July 2000. (Tr. 89-90). Mr. Buccini did not recall Claimant being hospitalized during the last year of his employment. (Tr. 85).

He further testified that Claimant also worked side jobs, and actually laid tile at Mr. Buccini's home. (Tr. 83). However, Claimant had to stop the tile job around July 12, 2000 because he was having difficulty finishing the work. (Tr. 84).

As operations manager, Mr. Buccini was present when therapist Karla Alberti arrived at the rail yard in order to evaluate the physical demands required to operate one of the cranes. (Tr. 85). According to Mr. Buccini, operating one of the cranes at the rail yard, which involves pushing buttons and moving levers, is "really not very strenuous." (Tr. 85).

Testimony of Mervin Boinstein

Mervin Boinstein worked for Ceres as a longshoreman alongside the Claimant, and testified at the hearing on his behalf. (Tr. 66). According to Mr. Boinstein, the longshoremen employed by the Employer are responsible for loading and unloading cargo at the rail terminal. (Tr. 67).

Mr. Boinstein has known the Claimant for approximately 25 years, and has consistently noticed that his right arm causes him pain after working for just an hour or an hour and a half. (Tr. 67-68). Mr. Boinstein, who claims he was at the rail yard all day long most days, could not recall at the hearing exactly when Claimant's arm first started causing him pain to the point he could no longer work; but he did see the swelling almost every time he saw the Claimant at the rail yard. Even though the Claimant usually worked the early shift, Mr. Boinstein testified that he did see the Claimant working the later, 3:00 pm to 11:00 pm shift. However, Mr. Boinstein was unable to notice a difference in Claimant's performance level or in the level of his pain during the late shift versus the early shift, simply stating that it progressively got worse over the last few years. (Tr. 70-71). In fact, Mr. Boinstein knew that in the last year of Claimant's

employment, the Employer tried to have him operate a fifth-wheel on numerous occasions, but he was unable to finish the job because of his right arm. (Tr. 72-73).

Testimony of Charles Anderson, Jr.

Charles Anderson also testified at the hearing on behalf of the Claimant. (Tr. 74). Mr. Anderson is a superintendent for Ceres at the CSX Railhead, and knew the Claimant when he worked for the Employer. According to Mr. Anderson, he observed Claimant operate a crane and a fifth-wheel, but noticed that he had problems with his arm. (Tr. 75). He noted that the Claimant's arm was all curled up and swollen every day. (Tr. 75).

As superintendent, Mr. Anderson worked all shifts during the day, and saw Claimant working the evening and daytime shifts in 2003. (Tr. 76). During that time, Mr. Anderson also saw Claimant operating a fifth-wheel on occasion, but not a lot because "it would bother him and he couldn't." (Tr. 76). And, like Mr. Boinstein, Mr. Anderson could not recall noticing a difference in Claimant's level of pain during the evening shift versus the early shift. (Tr. 77).

Medical Evidence

Initial Injury Reports

Claimant's Exhibit 6 (see EX 16, 19) consists of two medical reports dated July 13, 2000, and July 17, 2000 from the Johns Hopkins University Center for Occupational and Environmental Health. Claimant reported to the Johns Hopkins emergency room for the first time the day after the July 12, 2000 injury. According to that report, the July 12, 2000 injury was to Claimant's right leg, and a hose had ricocheted to his right shoulder. (CX 6, at 1). In addition to right leg pain, Claimant complained of right shoulder pain and discomfort on movement. The pain in his shoulder and leg worsened overnight, and Claimant reported to the hospital the following day.

The attending physician performed a physical examination, noting that the Claimant's right shoulder was grossly symmetric compared to the left side. He found no apparent gross bony deformity, and no bruising or swelling. On examination of the Claimant's right shoulder, the physician found decreased active range of motion in abduction about 60 degrees due to pain; the Claimant's internal and external rotation were not limited. (CX 6, at 1-2). The report also indicates that there was a soft tissue area of tenderness lateral and anterior to the AC joint of the Claimant's right shoulder. (CX 6, at 2). The attending physician concluded that Claimant suffered from a contusion to the right shoulder and right thigh, with bruising and soreness. The Claimant was advised to return to duty on July 18, 2000, with restrictions of lifting less than 50 pounds, and no lifting above the head. Claimant also received a prescription for pain and inflammation of the right shoulder.

Claimant returned to Johns Hopkins Bayview Hospital for a follow-up exam on July 17, 2000. (CX 6, at 3; EX 19). The accompanying report notes that Claimant returned for treatment post blunt trauma to his right shoulder and right thigh. At the time, Claimant reported that he was able to move his right arm more freely than the previous visit. (CX 6, at 3). The physical

exam revealed right shoulder tenderness with no bony deformity. The Claimant's right arm demonstrated active range of motion in external rotation without limitations, and a range of motion on lateral raising (abduction) to about 90 degrees. (CX 6, at 3). The attending physician concluded that Claimant's right shoulder contusion was improving.

Testimony of Andrew Pollak, M.D.

Dr. Andrew Pollak, who is an orthopedic surgeon and an associate professor of orthopedics at the University of Maryland Medical Center, testified on behalf of the Employer. (Tr. 95; EX 42). Dr. Pollak examined the Claimant on three separate occasions after July 12, 2000. Dr. Pollak testified that he knows Dr. Carlton, who is a plastic surgeon specializing in hand surgery. (Tr., at 98). According to Dr. Pollak, who performs shoulder surgery, Claimant's condition is not typically something related to plastic surgery. (Tr., at 98).

Dr. Pollak stated that Claimant sustained an injury to his right shoulder as a result of the July 12, 2000 incident. (Tr. 99). Specifically, Claimant suffered a contusion to his shoulder, along with tendonitis. Underlying those problems, according to Dr. Pollak, is a condition known as impingement syndrome, with some subacromial impingement and arthritis. (Tr. 99). Impingement syndrome is a degenerative arthritic condition associated with weakness in the rotator cuff, and impingement of the cuff between the acromion and the humeral head. (Tr. 113). Dr. Pollak testified that the effects of the July 12, 2000 injury on Claimant's shoulder have resolved, and that what he is now experiencing, and what is creating his difficulty, is the result of the chronic impingement syndrome in his shoulder, which is a degenerative condition. (Tr. 99). In other words, Claimant's current shoulder condition, according to Dr. Pollak, is not causally related to the July 12, 2000 injury. (Tr. 99).

Dr. Pollak explained that Claimant's degenerative condition has slowly worsened over time, and the direct blow to the shoulder he suffered on July 12, 2000 did not change the natural history of impingement syndrome in his shoulder. (Tr. 101). According to Dr. Pollak, because Dr. Matz's pre-2000 injury report paralleled his own December 13, 2002 report—that is, that Claimant had full range of motion with pain at extremes—Claimant's current condition was due to his progressively debilitating degenerative condition, and not his July 12, 2000 injury. (Tr. 112-116).

On September 29, 2003, Dr. Pollak reported that Claimant had limited range of motion. (Tr. 110-111). But because Claimant's condition was due to his degenerative disease, Dr. Pollak was unable to pinpoint exactly when between December 13, 2002—the date of Dr. Pollak's first evaluation— and September 29, 2003, Claimant's range of motion became limited. (Tr. 115-116). According to Dr. Pollak, the degenerative process of impingement syndrome is progressive; it starts out with pain at extremes of motion, and progresses to inflammation and eventually limited range of motion. (Tr. 118).

Dr. Pollak testified that had the natural history of Claimant's degenerative condition been changed by the July 12, 2000 injury, he would have expected a substantial difference in his December 13, 2002 exam. (Tr. 121). Instead, according to Dr. Pollak, Claimant's exam on December 13, 2002 resulted in the same findings as made by Dr. Matz before the 2000 injury.

Dr. Pollak also testified that if the Claimant had a normal arm, a hose hitting his arm would have caused less of a problem. He also felt that the Claimant would have been able to return to work operating a fifth wheel or crane after a normal healing period, if he had a normal arm (Tr. 102). Dr. Pollak testified that Claimant has a 53% permanent partial impairment of the right arm. (Tr. 108).

Employer's counsel also asked Dr. Pollak specifically about Claimant's ability to perform certain jobs. (Tr. 102). Dr. Pollak testified that he thought the Claimant could physically perform the duties of a parking lot attendant. (Tr. 102). He also thought that the Claimant could work at a McDonald's. With respect to the job duties of a security guard, as long as the Claimant did not have to interact with "bad people," and only had to walk around and patrol, Dr. Pollak felt that he could do the job. But the Claimant could not do things that required repetitive motion of his arm. (Tr. 103). Dr. Pollak testified that Claimant could perform the duties of a taxicab dispatcher, assuming that the job was set up ergonomically so that he did not have to reach up frequently for things. Dr. Pollak also testified that Claimant could work behind the counter at an auto parts store, assuming he did not have to do any heavy lifting or overhead activities, such as reaching up for parts, with his right hand. (Tr. 103). Finally, Dr. Pollak testified that Claimant could likely perform the crane operating duties six times in an hour without difficulty, but that operating a crane might be difficult for him to do consistently and frequently. (Tr. 104).

Employer also submitted the three reports completed by Dr. Pollak after examining the Claimant. The first report, dated December 13, 2002, notes that Claimant complained of difficulty with overhead activities because of his right shoulder, in addition to his right forearm problems.[5] (EX 13 B). According to Dr. Pollak, Claimant demonstrated full range of motion at the shoulder with pain at the extremes, and he was able to get the upper extremity into the complete overhead position. (EX 13 B, at 4).

Dr. Pollak also reviewed Claimant's medical records and concluded that he suffered multiple injuries to his right upper extremity associated with work related incidents.[6] (EX 13 B, at 8). However, he found it difficult to state the exact degree to which each incident contributed to Claimant's current right upper extremity impairment. Dr. Pollak did conclude, however, that Claimant had reached maximum medical improvement, and that he could continue to work as a crane operator without restriction. (EX 13 B, at 8). Finally, Dr. Pollak concluded that Claimant's total upper extremity impairment rating is 53%, but that given the time frame of events surrounding the most recent injury episode, it was not possible for him to specifically implicate the work related incident of July 12, 2000 as a causative factor in any of that impairment. (EX 13 B, at 9).

[5] Dr. Pollak's December 13, 2002 report erroneously refers to "left" arm and shoulder injuries. It is clear from the report that Dr. Pollak intended to describe Claimant's right upper extremity, and any mention of the left upper extremity was inadvertent.

[6] Dr. Pollak also took x-rays of Claimant's right shoulder, and found no evidence of fracture, bony destruction, or erosion. (EX 33). He was not able to identify any definite bone abnormality. (EX 33).

On September 29, 2003, Claimant visited Dr. Pollak for a follow-up Independent Medical Evaluation. (EX 37). In his report, Dr. Pollak focused on Claimant's right shoulder, indicating that the initial evaluations following the July 12, 2000 injury suggested that the condition involving his right shoulder was impingement syndrome, and the examination was consistent with mild impingement syndrome. (EX 37, at 4). Dr. Pollak provided a detailed explanation of Claimant's right shoulder condition, and its relation to the work-related injury:

> While it is possible that impingement syndrome can be rendered symptomatic as a result of a workplace incident such as that which the claimant sustained on July 12, 2000, it is more likely than not that such an injury would cause an acute exacerbation of a shoulder problem and not a permanent aggravation of one. Stated differently, it is unlikely that a workplace incident such as that sustained on July 12, 2000 (an incident in which he was struck in the [right] leg, [right] arm and [right] shoulder by an air hose) would result in a change in the natural history of the impingement syndrome of the claimant's shoulder.
>
> * * *
>
> It is my opinion, beyond a reasonable degree of medical probability, that [Claimant] sustained an acute exacerbation of a preexistent shoulder condition as a result of the July 12, 2000 incident, but not a permanent aggravation of that condition. I believe that the acute exacerbation had resolved and he had returned to his pre-injury condition (relative to the incident of July 12, 2000) as of approximately December 1, 2000. I believe that the shoulder condition has not limited his ability to work since approximately December 1, 2000.

(EX 37, at 4). Dr. Pollak also noted that Claimant was able to continue to work as a crane operator without restriction, but that he could work as a fifth-wheel driver only on a part-time basis. (EX 37, at 5).

Dr. Pollak conducted another follow-up examination of Claimant on May 21, 2004 at the request of the Employer. (EX 49). At the time of the evaluation, Claimant reported that his right shoulder and forearm condition had been deteriorating, and that he could no longer operate a crane for a full 8-hour shift. Upon examination of the right shoulder, Dr. Pollak found 140 degrees of forward flexion, 90 degrees of abduction, full external rotation, and internal rotation to the lumbosacral junction (markedly limited). (EX 49, at 2). The impingement tests were grossly positive. A review of Claimant's x-rays dated July 14, 2000 compared to x-rays taken at the follow-up exam on May 21, 2004, showed minimal degenerative changes in the right shoulder, which, according to Dr. Pollak, was essentially unchanged since 2000.

Dr. Pollak concluded that Claimant's degenerative right shoulder condition had deteriorated since his previous evaluation. (EX 49, at 3). Nevertheless, he again stated that there

was no causal relationship between the July 12, 2000 incident and Claimant's impingement syndrome, which is a degenerative condition, typically associated with arthritic change at the acromion. (EX 49, at 4).

James M. Carlton, M.D

Dr. James Carlton is a Board Certified Plastic Surgeon with Additional Qualifications in Surgery of the Hand, and was formerly an Assistant Professor of Surgery at the University of Maryland School of Medicine. (CX 1). Dr. Carlton examined the Claimant and reviewed his medical history on June 16, 2003 at the request of Claimant's counsel. (CX 2). During the examination, Claimant complained of constant right shoulder pain that worsens with any activity. As a result, he has reduced range of motion and difficulty reaching forward, and is unable to reach overhead. (CX 2, at 1). He also has numbness in the right ulnar distribution, weak grasp, intermittent swelling, and cramping in the right arm. Upon examination, Dr. Carlton noted severely reduced abduction (80 degrees) and internal rotation (45 degrees), and mildly reduced external rotation (60 degrees), along with limited flexion to 110 degrees and extension to 20 degrees. (CX 2, at 1). Dr. Carlton noted that the Claimant has a claw deformity and absent ulnar motor function, resulting in severely decreased grip strength. Finally, he noted that Claimant's right hand was slightly cooler than the left, and there was very slow refill from the ulnar circulation on the Allen's test. (CX 2, at 1).

Based on his examination, Dr. Carlton diagnosed Claimant with: (1) right shoulder impingement syndrome; (2) right elbow post-traumatic arthrosis; (3) right ulnar nerve dysfunction; and (4) right ulnar artery insufficiency. (CX 2, at 2). In Dr. Carlton's opinion, the Claimant has reached maximum medical improvement, and no other treatment was indicated except for continued palliative treatment of his pain. Dr. Carlton stated that, with a reasonable degree of medical certainty, because of his injuries and findings, the Claimant is unable to perform the essential functions of his current job. Nor did Dr. Carlton believe that this job could be modified in such a fashion that the Claimant would then be able to return to work. (CX 2, at 2).

Robert Riederman, M.D.

Dr. Riederman, of the Orthopaedic Specialty Center in Baltimore, prepared three reports, dated July 14, 2000, August 11, 2000, and February 21, 2001. (CX 4). Dr. Riederman's first report acknowledges Claimant's medical history, including the July 12, 2000 injury, along with Claimant's complaints of right shoulder pain. (CX 4, at 1; EX 18). According to the report, Claimant denied any prior history of shoulder pain, and indicated that Motrin helped reduce his pain.

Upon examination, Dr. Riederman found mild anterior superior tenderness and mild to moderate restriction of motion of the right shoulder, along with pain with extremes of motion. (CX 4, at 1). X-rays of the Claimants' right shoulder revealed Type III acromion and no fracture or dislocation. Dr. Riederman concluded that Claimant suffers from a soft tissue injury and contusion of the right shoulder. He advised that Claimant continue taking Motrin and prescribed

physical therapy. According to Dr. Riederman, Claimant can return to work as a fifth wheel driver. (CX 4, at 1).

In his August 11, 2000 report, Dr. Riederman noted that Claimant's physical therapy sessions were helping his right shoulder pain. (CX 4, at 2; EX 21). Dr. Riederman noted that the Claimant felt that his shoulder motion was okay. Upon examination, Dr. Riederman found mild tenderness about the anterosuperior aspect, with a satisfactory range of motion. According to Dr. Riederman, these findings show soft tissue injury and impingement syndrome of the right shoulder. (CX 4, at 2). Dr. Riederman prescribed Vioxx for pain and advised Claimant to discontinue therapy and begin an independent exercise program. Finally, Dr. Riederman told Claimant that he could continue to work at his regular duty. (CX 4, at 2).

On February 21, 2001, Claimant saw Dr. Riederman on an emergency basis at the request of Mr. Ed Fox, because of diffuse swelling in his right forearm. (CX 4, at 3; EX 22). Dr. Riederman examined Claimant's shoulder and right arm, finding no tenderness, and full range of flexion and abduction of his right shoulder. The only complaints of pain were with extremes of motion. (CX 4, at 3). Examination of Claimant's right forearm revealed diffuse tenderness with tightness and tense compartments.

Dr. Riederman concluded that Claimant's symptoms were not related to the right shoulder injury of July 12, 2000, but were more likely related to an intrinsic process within his forearm. (CX 4, at 3). Concerned about possible compartment syndrome, Dr. Riederman advised Claimant to see Dr. Zimmerman as soon as possible.

In a short correspondence to Employer's counsel dated July 15, 2004, Dr. Riederman stated that he agreed with Dr. Pollak's opinion that Claimant's shoulder injury fully resolved with no permanent impairment attributable to the July 12, 2000 injury. (EX 50). The following day—July 16, 2004—Dr. Riederman provided a follow up addendum explaining his opinion regarding Claimant's right shoulder. (EX 50A). After reviewing the Claimant's medical records, including his own assessments and Dr. Pollak's more recent reports, he concluded, "I do not believe that [Claimant] has sustained a permanent impairment of the right shoulder that would be causally related to the injury of July 12, 2000." (EX 50A, at 1). He stated:

> The fact that [Claimant] was seen in July and August 2000 and to my knowledge had no further treatment of his right shoulder up until the time that I saw him for a problem with his right forearm in February 2001, would lead me to conclude that his shoulder symptoms documented subsequent to February 21, 2001, were not causally related to the injury of July 12, 2000.

(EX 50A, at 1).

Neal B. Zimmerman, M.D.

After the July 12, 2000 injury, the Claimant saw Dr. Zimmerman regularly over the course of a three year period beginning in March of 2000 until May of 2003. (CX 9; EX 31).

During that time, Dr. Zimmerman examined and treated the Claimant's right arm problems. His reports contain a variety of observations regarding Claimant's right hand claw deformity and his complaints of pain and swelling.

In March 2001, Dr. Zimmerman advised Claimant to take time off of work as a result of the cellulitis in his right arm, which Dr. Zimmerman attributed to the July 12, 2000 accident. (CX 9; 10, at 2-3). At times, Dr. Zimmerman noticed improvement in Claimant's forearm. In the spring of 2001, Dr. Zimmerman recommended that Claimant return to work. During subsequent visits the Claimant reported episodic swelling in the arm with any type of activity. (CX 9, at 8). On May 24, 2001, the Claimant reported to Dr. Zimmerman that he could tolerate operating a crane without much difficulty; however, the pain and swelling was exacerbated by working heavy machinery such as the manual transmission on a heavy truck. (CX 9, at 10). Dr. Zimmerman instructed Claimant to return to work with restricted duties—he was to refrain from operating any heavy equipment other than a crane. (CX 9, at 10-11).

On August 15, 2001, Dr. Zimmerman reported that after discussing the situation with the Claimant and Mr. Ed Fox he felt the Claimant was able to continue to operate the fifth wheel so long as he could rest if it gave him problems. (CX 9 at 13). By spring of 2002, Dr. Zimmerman was still treating Claimant, but expressed frustration over not being able to offer more treatment that could improve his condition. (CX 9 at 15-20).

During those three years, Dr. Zimmerman made only passing reference to Claimant's shoulder. On March 15, 2001, Dr. Zimmerman noted that Claimant was having some intermittent achy anterolateral acromial pain in addition to the pain and swelling of his right forearm. (CX 9 at 4). On February 6, 2003, Dr. Zimmerman noted that Claimant reported evidence of a shoulder problem and mentioned the possibility of surgery. (CX 9 at 19). According to Dr. Zimmerman, he had not received preauthorization for evaluation or treatment of the shoulder at the time, but would do so with workers' compensation approval. (CX 9 at 19).

In a letter addressed to Employer's counsel dated April 30, 2004, Dr. Zimmerman wrote that he never treated Claimant for his right shoulder, and recalled making no mention of a right shoulder issue. (EX 43).

Frank J. Criado, M.D.

Dr. Frank Criado examined Claimant for the first time on March 30, 2001 after referral from Dr. Zimmerman. (CX 17; EX 26). Dr. Criado noted Dr. Zimmerman's concerns about possible vascular insufficiency. (CX 17, at 1). The Claimant reported recurrent cellulitis and swelling that was limited to the forearm, between the elbow and the hand. (CX 17, at 1). Upon examination, Dr. Criado noted the obvious scars and deformity of the upper right extremity, but found no clear-cut evidence of chronic venous insufficiency. (CX 17, at 1).

On April 5, 2001, after reviewing the Claimant's venous scan results, Dr. Criado reported that there was no indication for further vascular investigation or intervention that would be of benefit to the Claimant. (EX 27).

Paul Eder, M.D.

On May 30, 2001, Claimant visited Dr. Paul Eder at the suggestion of Dr. Zimmerman. (CX 7; EX 28). Upon examination of the Claimant's right arm, Dr. Eder found mild swelling. (CX 7, at 1). Initially, he felt that Claimant was suffering from recurrent infection of the right arm due to staphylococcus and streptococcus, or possibly another underlying problem. He also suggested the possibility that Claimant had mycobacterium marinum, given his exposure to the bay water. (CX 7, at 1).

On June 13, 2001, Claimant visited Dr. Eder for a follow-up examination. Dr. Eder reported that Claimant had no swelling or erythema of his right arm. (CX 7, at 3; EX 28). A bone and indium scan showed no evidence of osteomyelitis. (EX 29). Dr. Eder felt that the Claimant's intermittent swelling was related to his work and not necessarily an infection. (CX7, at 3). He instructed Claimant to return to work the next day, and if the swelling reoccurred, to stay off of work and allow the swelling to resolve on its own. According to Dr. Eder, if this was the case, then his condition was most likely work induced and not infection related. (CX 7, at 3).

Y.K. Shetty, M.D.

On September 3, 2003, Dr. Shetty examined the Claimant's right arm and shoulder. Like Dr. Carlton, Dr. Shetty noted Claimant's complaints of pain in the right shoulder, which limited his ability to lift his arm overhead, along with numbness over the ring and little fifth finger area, and recurrent swelling of the arm. (CX 3, at 1). Upon examination, Dr. Shetty found reduced range of motion in Claimant's right shoulder and right wrist, and minimal swelling of the right upper extremity. He also found limited extension and flexion in Claimant's right elbow. He noted that the Claimant had claw deformity of the 4^{th} and 5^{th} fingers. (CX 3, at 1).

Based on his findings, Dr. Shetty diagnosed Claimant with the following: (1) right ulnar nerve dysfunction with claw fingers; (2) right elbow arthrosis with reduced range of motion; (3) right shoulder impingement syndrome; and (4) right ulnar artery insufficiency. He concluded that Claimant was no longer able to perform his duties as a longshoreman. (CX 3, at 2).

In a letter to Employer's counsel, Dr. Shetty indicated that he agreed with Dr. Pollak and Dr. Zimmerman's opinions that the Claimant's shoulder problem is unrelated to his July 12, 2000 injury. (EX 46). He provided no further explanation.

Edward R. Cohen, M.D.

Dr. Edward Cohen treated the Claimant for a number of years dating back to the 1980's. (CX 8). The record includes a number of reports by Dr. Cohen related to Claimant's right arm before and after the July 12, 2000 injury. Thus, on June 18, 1997, Dr. Cohen noted that Claimant had sustained multiple injuries to his right arm and hand, resulting in clawing of the fourth and fifth fingers and diminished sensation. (CX 8, at 1; EX 13 E). At that time, Dr. Cohen assigned a 55% impairment rating to Claimant's right upper extremity.

Dr. Cohen examined Claimant on June 20, 2001. (CX 8, at 4). The Claimant complained of pain in his *left* hand after a fall at work. Dr. Cohen saw Claimant regularly until October 31, 2001 for treatment of his left hand and wrist. At no time after July 12, 2000 did Dr. Cohen make any findings or reach any conclusions regarding Claimant's right arm, hand, or shoulder. He did conduct a nerve test on both of Claimant's upper extremities, which revealed normal F waves and normal nerve conduction in both hands. (CX 8, at 5). Dr. Cohen felt that the Complainant could continue to work at that time. On July 5, 2001 follow-up examination, Dr. Cohen noted that Claimant appeared to be performing his job satisfactorily, and he recommended that Claimant continue his normal occupation. (CX 8, at 6).

Other Evidence

The record contains a number of operative reports regarding the pre-July 12, 2000 surgeries performed on Claimant's forearm by Dr. Zimmerman, explaining the nature of the procedures. (CX 11-13).

Claimant submitted a report on the results of an MRI of his right forearm dated April 17, 2001. (CX 14). The MRI was ordered by Dr. Zimmerman, and the report was dictated by Dr. Andrew Yang. The MRI showed evidence of scars and mild muscle edema, but no identifiable abscess or fluid collection. (CX 14).

The record also contains a report documenting the results of a bone and indium scan of Claimant's forearm, showing mild increased flow to the right elbow, with mild soft tissue hyperemia. (CX 15). The tests also revealed degenerative changes in the Claimant's right thumb and 4th finger joints as well as in the right elbow. There was no evidence to indicate osteomyelitis. (CX 15, at 1-2).

Stephen R. Matz, M.D.

Dr. Stephen Matz examined the Claimant five years after his 1994 injury, on March 31, 1999. (CX 5). In addition to examining Claimant's right hand, arm, and shoulder, Dr. Matz reviewed Claimant's medical history. In his report, Dr. Matz noted that Claimant complained of right upper extremity pain that had progressively worsened over the previous few years. (CX 5, at 1). Specifically, Dr. Matz noted constant numbness in the right 4th and 5th digits, and some right shoulder pain. The physical examination of the left upper extremity was unremarkable other than noting some superficial scars. According to Dr. Matz, the Claimant had full range of motion of the right shoulder in all planes, with some mild pain at the extremes. Abduction was strong; impingement was negative. (CX 5, at 2). Dr. Matz further noted that Claimant had an excellent clinical result of the right upper extremity, and was working regularly at the same job he was doing before he was injured on April 30, 1994. (CX 5, at 3). Despite having significant impairment of the right fingers, Claimant's remaining use of the right hand, wrist, forearm, elbow, arm, and shoulder was quite good. Dr. Matz assigned a 55% permanent partial impairment rating to Claimant's right upper extremity, of which 40% was due to the injury sustained in April of 1994. (CX 5, at 4).

Allan Macht, M.D.

Dr. Allan Macht examined the Claimant on December 1, 1998 for complaints of pain and swelling in his forearm. (EX 13 F). After examining the Claimant's right forearm and hand, which he described as getting worse, Dr. Macht concluded that Claimant suffers from a 54% impairment of the right arm due to loss of range of motion at his hand, wrist, and elbow.

Vocational Evidence

Karla T. Alberti, PT

Physical Therapist Karla Alberti examined the Claimant and completed a Functional Capacity Evaluation report on April 10, 2003. (CX 19; EX 13 C). The examination was ordered by Employer for the purpose of determining whether the Claimant could perform his usual job as a fifth-wheel operator. (CX 19, at 1). In preparation for her examination, Ms. Alberti interviewed the Claimant, consulted the Dictionary of Occupational Titles, and performed an on-site job analysis of Claimant's duties and the physical demands of operating a fifth-wheel. During the functional capacity testing, Claimant was able to fully participate in 9 of the 12 tasks administered; Claimant limited his performance during the lift above his shoulder, and during 2 reaching tasks because of his right forearm symptoms. (CX 19, at 5). The report indicates that Claimant complained of intermittent episodes of aching through the posterior aspect of the right shoulder and into the upper arm, which had been increasing over the previous 6 months. (CX 19, at 3). He also reported constant cold and clammy sensations through his right forearm and hand. The symptoms, according to the report, were specifically aggravated by repetitive gripping or use of the right hand. (CX 19, at 3).

The report provides a complete list of Claimant's musculoskeletal impairments. (CX 19, at 3). According to Ms. Alberti, Claimant has limited range of motion of the right shoulder girdle and functional range of motion of the right elbow and forearm. (CX 19, at 3). She also reported normal motion of the radial 3 digits of the right hand, and limited motion of the ulnar 2 digits of the right hand. Finally, she noted isolated compartments of swelling of the right forearm following activity. (CX 19, at 3).

Ms. Alberti also discussed the Claimant's functional limitations. Initially, Ms. Alberti noted that the Claimant's abilities fall within the broad parameters of the Medium Work category, meaning that he is limited to exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. (CX 19, at 4). Ms. Alberti also determined that the Claimant is further limited in his abilities to lift, carry, push, pull, and reach. (CX 19, at 4). According to Ms. Alberti, repetitive force generation of greater than 20-lbs. with the right hand resulted in rapid and distinct compartmental swelling of the right forearm. (CX 19, at 4).

According to Ms. Alberti, the physical demands of a fifth-wheel operator include right hand grip of 20-lbs. of force to operate shift knobs, levers, and air-hose clamps. (CX 19, at 4). The duties also include frequent forward reaching, occasional climbing, and frequent pushing and pulling a steering wheel with 20-lbs. of force. Based on those findings, Ms. Alberti felt that Claimant would be able to meet the sitting and climbing demands of this position, but that his

shoulder symptom complaints would limit his tolerance of forward reaching to an occasional basis. (CX 19, at 4).

Ms. Alberti stated that objective evidence of compartment swelling, along with subjective complaints of forearm pain, would limit the Claimant's tolerance of repetitive movement [? illegible] with the right hand, i.e., operation of shift lever, emergency brake, elevation plate lever, and air-hose clamps. (CX 19, at 4). The tests indicated that Claimant would not tolerate transportation of more than 20-30 boxes during a work shift, i.e., occasional gripping of the right hand. (CX 19, at 4). Ms. Alberti noted that the Claimant did not report the same stresses on the right arm while operating the crane because the hand controls consist of small levers requiring only 2-3 inches of excursion and no gripping, and the majority of the controls are operated with the left hand. (CX 19, at 4).

Testimony of Camilla Beyon Mason

Ms. Camilla Mason, who is a rehabilitation vocational specialist, was called to testify at the hearing on behalf of the Employer. (Tr. 122). Ms. Mason met with the Claimant to conduct a vocational assessment to determine the types of jobs he could perform given his educational background, physical limitations, and other work restrictions. (Tr. 124). According to Ms. Mason, Claimant has an average IQ with limited reading, writing, and mathematical skills.[7] (Tr. 124, 140) Because of Claimant's medium duty work release, Ms. Mason researched jobs she described as in a light to sedentary capacity. (Tr. 31). Ms. Mason described a number of jobs she found appropriate for the Claimant given his physical limitations and background, which were also available during September of 2003, including: parking lot attendant, security guard,[8] auto part counterperson, dispatcher, assembler/packer, and fast food cashier. (Tr. 131-139).

The record contains a "Vocational/Labor Market Survey" dated March 19, 2004 completed by Ms. Mason. (EX 40). After conducting physical and cerebral tests and reviewing prior Functional Capacity Evaluations, Ms. Mason determined that the positions of Parking Lot Attendant, Dispatcher, Auto Parts Counterperson, and Assembler/Packer, which pay $6.00 to $11.00 per hour, are suitable positions for the Claimant and were readily available in the Baltimore-Washington area in December of 2002. Ms. Mason also noted that she made direct contact with many of the potential employers to ascertain the physical demands and availability of the positions. For varying reasons, Ms. Mason concluded that Claimant is physically and

[7] During Ms. Mason's testimony, Employer's counsel asked her if the Claimant had any criminal convictions that might restrict his ability to obtain certain employment. (Tr. 124). Ms. Mason responded that Claimant told her he had none. Ultimately, Ms. Mason based her evaluation on the information provided to her by the Claimant. However, after a lengthy exchange between counsel and after Claimant testified again in his rebuttal case, it became clear that Claimant does have two criminal convictions on his record that would prevent him from obtaining certain employment. Claimant was convicted of interstate transportation of stolen securities in 1978, and possession of narcotics in the early 1970's. (Tr. 153). While it is not clear why this information was not provided to Ms. Mason initially, any further inquiry is immaterial to the issues at bar. The effect of the revelation of Claimant's criminal convictions is minimal in determining whether Employer has established the existence of suitable alternate employment, as the only negative impact of his convictions would be in his ability to land a job as a security guard.

[8] Ms. Mason acknowledged that Claimant would not be able to obtain a position as a security guard unless he had his criminal record expunged.

mentally able to perform each job. She also listed the specific locations of the jobs along with contact information. (EX 40).

In an addendum dated April 16, 2004, Ms. Mason explained that the positions she included in the survey are sedentary to light, despite the fact that the Functional Capacity Evaluation indicated the Claimant has the ability to perform medium work. (EX 45.) According to Ms. Mason, she focused on sedentary to light duty jobs based on a request from Employer's counsel, and Dr. Pollak's impairment rating of 53%.

Ms. Mason submitted another addendum dated August 2, 2004, in which she described her recent contacts with the potential employers listed on her previous reports, about whether Claimant's 1970 felony conviction would affect his eligibility. (EX 56). According to Ms. Mason, it appeared that the client's past criminal conviction would not have a negative impact on his ability to secure the positions listed in the Labor Market Survey of March, 2004." (EX 56, at 4). Most employers, according to the addendum, indicated that since the conviction was so long ago, it would not pose a barrier to securing employment. She further explained that the Security Guard position would be available if Claimant had his record expunged. Additionally, Ms. Mason provided a list of Cashier jobs at fast-food restaurants, which she described as physically appropriate for the Claimant. (EX 56, at 2).

Ms. Mason submitted her final addendum, dated September 9, 2004, after the hearing. (EX 57). As mentioned above, I have admitted only a limited portion of the exhibit. *See Stepek v. Ceres Terminal Inc.*, 2004-LHC-00798, Orders (ALJ September 21, 2004 and October 6, 2004). In this final report, Ms. Mason noted that she had personally visited employers in early September 2004 in order to confirm that the positions were available. According to the report, an Advanced Auto Parts store on West Patapsco Ave. in Baltimore had a counterperson position available on September 3, 2004 that the Claimant could perform with the appropriate accommodations. (EX 57, at 2). Also, Ms. Mason reported that the Burger King on Liberty Road in Baltimore had a cashier position available on September 3, 2004 that would provide accommodations and would not require Claimant to perform heavy lifting. (EX 57, at 3). Similarly, the Taco Bell on West Baltimore Street in Baltimore had a cashier position available on September 3, 2004. As did Burger King, Taco Bell expressed willingness to accommodate the Claimant should he require assistance in performing his duties. (EX 57, at 8).

Charles Smolkin

On July 21, 2004, Charles Smolkin, President of Smolkin Vocational Services, Inc., examined the Claimant, reviewed Dr. Carlton's and Dr. Shetty's reports, and completed a "Vocational Assessment" in order to establish Claimant's vocational capacities. (CX 20). After considering the Claimant's background,[9] his duties as a Heavy Equipment Operator,[10] and medical records, Mr. Smolkin concluded that the Claimant suffered injuries to his right arm and

[9] Mr. Smolkin reported that the Claimant has average reasoning ability, and above average to below average levels of academic achievement. He rated the Claimant at the 9.3 grade level for reading, and the 6.7 grade level for math. (CX 20, at 2).

[10] Mr. Smolkin noted that the work as a Heavy Equipment Operator is considered medium in exertion. (CX 20, at 2).

shoulder that precluded his return to his occupation as a Heavy Equipment Operator. (CX 20, at 3). He based his conclusion on Claimant's demonstrated inferior fingertip dexterity with the right hand and below average dexterity with the left hand. (CX 20, at 2). Furthermore, because the Claimant is right hand dominant, Mr. Smolkin concluded that he had inadequate skills for entry level occupations that required the dexterous use of the fingertips. (CX 20, at 2). In Mr. Smolkin's opinion, the Claimant would not be able to perform his prior work involving manual duties. (CX 20, at 3).

Mr. Smolkin also determined that Claimant could not physically perform the jobs of Auto Parts Counter Person, Parking Lot Attendant, or Assembler/Packer; he has no skills to perform the job of Dispatcher; and his prior felony conviction would prevent employment in any job involving the handling of money, or a position as a Security Guard. (CX 20, at 3).

Mr. Smolkin testified at a deposition on July 29, 2004. (CX 22). Much of his testimony paralleled the findings and conclusions in his July 21, 2004 report. Specifically, Mr. Smolkin testified that he was asked to provide an opinion as to whether the Claimant could perform the jobs contained in Ms. Mason's first vocational report; and, according to Mr. Smolkin, the Claimant was certainly not employable in the jobs recommended by Ms. Mason. (CX 22, at 8). In response to a direct question regarding fast food chains, Mr. Smolkin testified that a job with a fast food restaurant would be inappropriate for the Claimant, because all of those jobs require physical exertion that he cannot perform, in particular, repetitive tasks that are required of someone in that position. (CX 22, at 11-12). When asked about the Auto Parts Counter Person position, Mr. Smolkin testified that Claimant would not be able to perform the tasks of lifting heavy parts or reaching above his head. (CX 22, at 26). Mr. Smolkin testified that Claimant could not perform any job that required him to use his right hand repeatedly. (CX 22, at 28). Finally, Mr. Smolkin felt that Claimant did not have the skills necessary to be a dispatcher. (CX 22, at 29).

The record also contains a letter dated September 7, 2004 written by Mr. Smolkin in response to Ms. Mason's second vocational report. (CX 25). Specifically, Mr. Smolkin wrote that he attempted to contact the individuals identified in Ms. Mason's report as managers or assistant managers. According to Mr. Smolkin, he was able to reach 4 of the 7 individuals.[11] Based on his conversations with these individuals, Mr. Smolkin concluded: (1) that none of the individuals contacted remembered talking to Ms. Mason; (2) that Ms. Mason did not discuss Claimant's specific limitations with the employers and (3) that the position of Cashier for a fast-food restaurant is beyond the Claimant's physical capacity, as it requires performing tasks such as taking money, cleaning, cooking, and packing food into bags. (CX 25, at 2). In fact, each manager with whom Mr. Smolkin spoke indicated that a Cashier position requires the use of both hands, as well as the ability to perform multiple tasks beyond simply handling money. (CX 25).

Mathew Drzik

[11] Mr. Smolkin spoke with a manager or assistant manager from the following fast food restaurants: KFC on York Road in Baltimore; Taco Bell on West Baltimore Street in Baltimore; Burger King on Liberty Road in Baltimore; and Burger King on Reisterstown Road in Baltimore. (CX 25).

Employer submitted a letter dated August 6, 2004 from Mr. Mathew Drzik of NovaCare Rehabilitation, who reviewed the Claimant's file after Ms. Alberti's departure from the clinic. (EX 55). Mr. Drzik was asked to determine whether Claimant could work as a cashier at McDonald's for an eight hour day. After reviewing the Claimant's testing data, Mr. Drzik concluded that the Claimant could in fact work as a fast-food cashier. Ms. Alberti's FCE indicated that the Claimant could stand frequently, and that he demonstrated one position change during the standing test with no symptom reports or deviations. On that basis, Mr. Drzik concluded that the Claimant could handle the combination of static standing and dynamic standing that a cashier would experience behind a fast-food counter. (EX 55).

Claimant's "Rebuttal" Testimony

Claimant's counsel recalled Claimant to testify about his attempts to obtain the jobs listed by Ms. Mason. (Tr. 145).[12] The Claimant stated that he applied to Salvo Auto Parts on June 5, 2004 and for two Advanced Auto Parts positions in late July 2004, as listed on Ms. Mason's initial vocational report. (Tr. 151-152). He also applied for jobs that were not on the report, but that he found listed in the Sunday paper in April and July 2004, including positions at The Dennis Equipment Company, McCormick's, A&J Alwat's, Downtown Parking lot, and American Cab. (Tr. 152). Despite his efforts, Claimant was unable to obtain a position with any of these employers for a variety of reasons related to his physical restrictions and educational background.

Video Tape

Employer submitted a 5-7 minute videotape of an unidentified man demonstrating and discussing the operation of a crane and fifth-wheel machine at the CSX Railhead on January 29, 2004. (EX 44; Tr. 84). The first segment of the video shows a man operating a crane from inside the cockpit. The tape clearly shows that the crane operator is required to actively use both hands in order to operate 5-6 different levers, switches, and buttons situated on both sides and in the middle of the cockpit. It appears that the man demonstrating the operation rapidly and repeatedly grips, pushes, and pulls the levers and switches with minimal effort.

The final segment of the videotape also depicts an unidentified man driving a fifth-wheel hustler. The man in the video appears to be operating a steering wheel—virtually identical to that in an automobile—with two hands as he drives forward. As he drives the machine in reverse, the man in the video turns over his left shoulder to look backwards out the driver side window, and steers the machine with his right hand only. (EX 44).

II. Stipulations

The parties have stipulated, and based on the record I find the following:

I. 33 U.S.C. §901 et seq. (LWHCA) is applicable to this claim.

[12] After a brief discussion about whether Claimant's testimony constituted rebuttal and whether the Employer would have a sufficient opportunity to respond, I allowed Claimant to testify about his efforts to obtain employment and provided Employer's counsel an opportunity to submit evidence post-hearing in response to that testimony.

II. Claimant sustained an injury to his right arm on July 12, 2000 while working for Employer, and the injury was in the course of and arising out of Claimant's employment with Employer.

III. The Claimant and Employer were in an employer/employee relationship on the date of the accident or injury.

IV. The Claimant provided timely notice of the injury.

V. The Claimant's claim was timely filed.

VI. The Claimant's average weekly wage was $1,396.15

VII. The Claimant reached maximum medical improvement on August 18, 2003.

VIII. The Claimant retired on September 29, 2003.

IX. The Claimant received temporary total disability compensation up to June 13, 2001 at the rate of $901.28.

X. The Claimant is not capable of operating a fifth-wheel hustler.

XI. The Claimant suffers from a 53% permanent impairment of his right arm.

III. Issues

I. Whether Claimant's claim is covered under Sections 3(a) and 2(3) of the Act.

II. Whether Claimant has a permanent right shoulder impairment causally related to the July 12, 2000 injury.

III. The nature and extent of Claimant's right arm injury.

IV. Whether Employer is entitled to a credit for compensation previously paid for Claimant's first two work-related right arm injuries.

V. Whether Employer is entitled to 8(f) relief.

IV. Discussion

Coverage

Initially, Employer argues that, pursuant to Sections 2(3) and 3(a), the Claimant is not covered by the Act. 33 U.S.C. §§902(3), 903(a). Specifically, Employer maintains that because

Claimant was unloading a train located in a rail yard separate from the marine terminal at the time of the injury, he was not engaged in "maritime employment" occurring upon the "navigable waters" of the United States. For the following reasons, however, I disagree with Employer and find that Claimant is covered by the Act.

To be eligible for compensation under the Act, an individual must be an employee as defined by §2(3), who sustains an injury on situs, as defined by §3(a). *P.C. Pfeiffer Company, Inc. v. Ford*, 444 U.S. 69, 74 (1979). In other words,

> [t]he Act…contains distinct situs and status requirements. The situs test of §3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the *Jensen* line.[13] This test defines the broad geographic coverage of the Act. Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment." This section defines the Act's occupational requirements. The term "maritime employment" refers to the nature of a worker's activities.

Id., at 78. The situs test under Section 3(a)—expanded significantly by the 1972 Amendments—expressly provides that an "employee" whose disability "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel) is covered under the Act." 33 U.S.C. §903(a). The status test under Section 2(3) defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker…" 33 U.S.C. §902(3); *see Ford*, 444 U.S. at 73-74.

In the instant case, there is no dispute that Claimant was not injured while working over navigable waters. Thus, the situs question here is whether Claimant's injury occurred upon one of the enumerated sites listed parenthetically in Section 3(a), or upon an "other adjoining area." While it is clear that the CSX Railhead, where Claimant's injury occurred, does not fit tightly into the definitions of the land side facilities enumerated in Section 3(a), Congress incorporated a catchall term—"adjoining areas"—that must be examined and applied to the case at bar.

The Fourth Circuit, within whose jurisdiction this case arises, has addressed the meaning of "other adjoining area" under Section 3(a). In an attempt to articulate the standard under

[13] In *Ford*, the Supreme Court explained the history of the coverage provisions of the Act, and noted that in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which is a pre-1972 Amendments decision, coverage was limited significantly to employees injured only over water while excluding those injured on land. The *Ford* Court refers to the "line" drawn by the single situs requirement of the Act pre-1972 Amendments as the "*Jensen* line." The Court further explained in *Ford* that since the 1972 Amendments, the Act's coverage extends landward by utilizing a two-part situs and status standard in order to "raise the amount of compensation available under the Act." *Ford*, 444 U.S. at 73-74; *see Jonathan Corporation v. Brickhouse*, 142 F.3d 217 (4th Cir. 1998). In short, by defining navigable waters to include areas "adjoining" those navigable waters, Congress moved the "*Jensen* line" or "line of demarcation" landward. *Brickhouse*, 142 F.3d at 219, 222.

Section 3(a), the Fourth Circuit examined its sister circuits' tests, and concluded that a more manageable test, consistent with the plain language and purpose of the 1972 Amendments, is necessary. Thus, in *Sidwell v. Express Container Services, Incorporated*, 71 F.3d 1134 (4th Cir. 1995) the Fourth Circuit concluded that "in order for an area to constitute an 'other area' under the statute, it must be a discrete shoreside structure or facility,"[14] and "the asserted 'area' must be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." *Id.*, at 1139 (internal quotations omitted). In *Sidwell*, in which the claimant was injured at a site eight-tenths of a mile from a ship terminal while repairing a shipping container, the Fourth Circuit concluded that the claimant did not meet the situs test. The Court reasoned that while the facility was arguably an "area" within the terms of the statute, "it is not an area 'adjoining' navigable waters under the statute." *Id.*, at 1141. And, while the overreaching "area" in which the facility resides was "adjoining" waters at some point, it was not an area understood as of the same type as those enumerated in §3(a), or one at which the loading, unloading, and repair of vessels occurred. *Id.*

Then in *Jonathan Corporation v. Brickhouse*, 142 F.3d 217 (4th Cir. 1998), the Fourth Circuit reaffirmed the rule enunciated in *Sidwell*, when it determined that the claimant was not injured upon a situs covered by the Act. In *Brickhouse*, the claimant was injured while working for a steel fabrication firm at a facility "situated…contiguous to the Southern Branch of the Elizabeth River, a navigable waterway, and the property has a dock for loading barges."[15] *Id.*, at 219. The facility in *Brickhouse* was made up of three "bays" used for separate maritime, non-maritime, and bridge projects. The claimant spent most of his time welding for non-maritime projects. *Id.*, at 218. The Fourth Circuit also noted that the employer "receives all of its steel by rail or truck, and likewise ships out most of its fabricated product by rail or truck." *Id.*, at 219. The Fourth Circuit rejected the ALJ's and Benefits Review Board's determination that the claimant satisfied the situs test simply because the "location is used by the employer in loading and unloading vessels." *Id.*

In acknowledging that Congress' principal purpose in expanding the coverage line landward was to "provide more uniform coverage for longshoremen as they loaded and unloaded ships and repaired them," the Fourth Circuit pointed out that coverage under §3(a) extends only to land "relating to work on those waters," which is "customarily used by longshoremen in loading and unloading ships and in repairing or building them." *Id.*, at 221. Thus, the Court's ruling paralleled the standard enunciated in *Sidwell*: "The 'other area' annexed to navigable waters by the Act must again be 'adjoining' the water and must again be linked to the traditional longshoremen's work on the water." *Id.*

The Fourth Circuit in *Brickhouse* held that the employer's facility was not a similar type of facility to those enumerated in §3(a) so as to fit into the catchall provision. *Id.*, at 222. In doing so, the Court focused on the fact that the claimant rarely left the fabrication plant, and that

[14] The Fourth Circuit explained that the ordinary meaning of "adjoin" is "to lie next to," to "be in contact with," to "abut upon," or to be "touching or bounding at some point." *Sidwell*, 71 F.3d at 1138-39. Thus, the Court held that an "area is 'adjoining' navigable waters only if it 'adjoins' navigable waters, that is, if it is 'contiguous with' or otherwise 'touches' such waters." *Id.*

[15] Although the Fourth Circuit described the property on which the facility was situated as "contiguous" to the river, it did note that the facility was located approximately 1,000 feet from the river. *Brickhouse*, 142 F.3d, at 220.

it was necessary for the fabricated components to be removed from the plant before installation, whether by ship or not. *Id.* The simple fact that the property on which the facility was situated was contiguous to the river was not sufficient to make workers in the plant "longshoremen" working at the water's edge. *Id.* Nor was it significant, according to the Fourth Circuit, that components on rare occasion were shipped by barge; only if shipment by barge was the "customary" method and the employees were longshoremen who customarily loaded the barge at the facility would the barge dock be relevant. *Id.* The Court ultimately concluded that the plant was "not a facility, the 'raison d'etre of which is its use in connection' with the nearby navigable waters." *Id. citing Sidwell*, 71 F.3d, at 1139.

Based on the Fourth Circuit's interpretation of §3(a), I find that Claimant in the instant case was injured at a situs covered by the Act. Employer argues that because the CSX Railhead is separated by a fence and gate from the other parts of the port, and the cargo is loaded on and off of trains to be shipped out of the yard via train or truck, the facility does not meet the situs test. According to the Employer, the only possible connections the rail yard has to the loading and unloading of ships is that the employees working at the rail yard, including the Claimant, are members of the ILA Longshoreman's union, and a small portion of the cargo eventually makes its way to the rail yard by ship. Brief of the Employer, at 32-33 (October 12, 2004). As Employer's argument goes, since other longshoremen working for P&O Ports of Baltimore physically move the cargo from ship to the rail yard, only the P&O workers could be covered by the Act. While I agree with Employer that the label of "longshoremen" alone does not put Claimant under the broad coverage of the Act, I do not agree with Employer's very limited characterization of what occurs at the CXS Railhead. More importantly, Employer's position is at odds with Congress' clear intent to expand coverage under the Act.

According to the Fourth Circuit, the link between the navigable waters and the land side facility is established under the statute by "(1) the contiguity of the land side facility and navigable water, and (2) the affinity of the land side facility to longshoremen's work on ships." *Brickhouse*, 142 F.3d 221. Here, there is no question that the CSX Railhead, like the property in *Brickhouse*,[16] is geographically contiguous to the navigable waters in Baltimore. In fact, the CSX Railhead is only 200 feet from the ships parked at the terminal—much closer than the plant in *Brickhouse* which was 1,000 feet from the river. Testimony from a number of witnesses indicated that the rail yard is part of the Sea Girt Marine Terminal in Baltimore, separated only from the other operations on the waterfront by security fences; before September 11, 2001 the entire terminal was open.

Contrary to Employer's contention, the simple fact that a fence separates the rail yard area from the immediate dockside less than 100 feet away[17] does not disconnect CSX Railhead from the water so that they are not geographically contiguous. To hold otherwise would defy common sense, and disregard the purpose of the 1972 Amendments to create uniform coverage for longshoremen. Accepting Employer's position would mean that longshoremen can walk in

[16] The Fourth Circuit described the property on which the facility was situated in *Brickhouse* as contiguous to the river. *Brickhouse*, 142 F.3d, at 219. It denied coverage simply because the plant was not connected to the river in any way necessary to make workers in the plant longshoremen. *Id.*, at 222.

[17] Claimant testified that the area in which he was working at the time of the injury is only 100 feet away from the gate separating the dockside, which is then another 100 feet from the ships in the water. (Tr., at 25-26).

and out of coverage simply by crossing a fence line. *See Brickhouse*, 142 F.3d at 1140 (holding that while some notion of a property line is a relevant factor to consider, the broad purpose of the amendments is to prevent longshoremen from walking in and out of coverage "as they walked the gangplank from ship to shore."). The 1972 Amendments, according to the Fourth Circuit, simply do not define coverage with such a hard line. The rail yard here is not separated from the water by a street, building, or any other obstacle that would define it as an area distinct from the waterfront, but is only separated by a gate that is used to monitor the cargo that passes through it. *See Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998)(Table) (building separated by fence and public roads is not covered under §3(a)); *McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 207 (1998) (employer's shipyard separated by public roads not adjoining navigable water held not a situs covered by the Act); *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998) (employer's parking lot separated from the shipyard by a fence and a public street is a separate and distinct parcel of land not covered by the Act).

Not only is the rail yard geographically contiguous to the navigable waters, but the "affinity" of the CSX Railhead to the work performed by longshoremen is undeniable. Claimant, unlike in *Brickhouse*, was working along the waterfront within 200 feet of the water, moving cargo that may or may not have come from ships. Admittedly, while the *Brickhouse* Court noted that the fact that some of the components fabricated by the claimant were shipped by barge did not make the facility an "adjoining area" under the Act, it did not deny situs coverage based on that fact alone. The Fourth Circuit was more concerned with the fact that the workers in the fabrication plant simply manufactured components that could eventually be shipped by barge, but had nothing to do themselves with the shipping. Here, the operations at the CSX Railhead performed by Employer's workers are without doubt directly involved in the shipment of cargo at the Baltimore marine terminal.

The hearing testimony showed that some of the cargo moving through the CSX Railhead does in fact come from and go to the back gate of the terminal, where the P&O workers move cargo directly to and from the ships.[18] (Tr. 25-26). The fact that the Employer's workers do not directly remove cargo from or place cargo onto the ships does not mean that they do not handle that type of cargo at some point, or that the rail yard is not "a facility, the 'raison d'etre of which is its use in connection' with the nearby navigable waters." *Sidwell*, 71 F.3d, at 1139. Instead, based on the testimony of the Claimant and the operations manager, I conclude that the CSX Railhead is sufficiently connected to the longshoremen's duties on the water's edge. It is clear from the hearing testimony that without the operations at the CSX Railhead, that portion of cargo arriving to the marine terminal by ship would not leave the waterfront at all. By arguing otherwise, Employer asks this tribunal to accept the untenable position that a rail yard located directly on the property of a sea port along the eastern seaboard, where cargo is brought to port via ship, and where the Claimant works to move cargo, is not a situs covered by the Act. Under the authority prescribed in the Fourth Circuit's most recent decisions, I cannot accept the Employer's position. Thus, I find the Employer's facility is a situs covered by the Act.

[18] Curiously, the Employer's operations manager who oversees the CSX Railhead testified that he has no idea from where the cargo comes or where it goes beyond the rail yard. (Tr., at 92). Nevertheless, he did admit that a low volume of the cargo moved by the Employer comes from ships. (Tr., at 80).

Likewise, I find that the Claimant meets the status test under §2(3) of the Act—i.e., Claimant was engaged in "maritime employment." Generally, a claimant satisfies the status requirement if he is an "employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels." *McKenzie v. Crowley American Transport, Inc.*, 36 BRBS 41, 2002 WL 937755 (2002). In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), the Supreme Court explained that coverage under the Act is limited to "those workers involved in the essential elements of unloading a vessel," 432 U.S. at 266-67; or put another way, those "whose work facilitates the loading, unloading, repair or construction of vessels," *McKenzie*, 2002 WL 937755, *3. In doing so, the Supreme Court rejected the "point of rest" theory, which advocated coverage of only those employees who moved cargo from the vessel to its initial point of rest on the pier or in the terminal area and vice versa.[19] *Caputo*, 432 U.S. at 276-279; *Ford*, 444 U.S. at 76 (Supreme Court held point-of-rest test inconsistent with congressional intent). Then in *Ford*, the Supreme Court extended the definition of "maritime employment" to land-based workers who, though not actually loading or unloading vessels, are involved in the "intermediate steps" of moving cargo between ship and land transportation. 444.U.S. at 83; *see McKenzie*, 2002 WL 937755, *3.

In *Ford*—a consolidated case—the Court held both claimants were covered by the Act. Claimant Ford was a warehouseman responsible for the limited task of fastening military vehicles to railroad flatcars. The vehicles had been delivered to the port by ship and stored in a holding area. According to the warehousemen's union contract, warehousemen were expressly precluded from moving cargo directly from a vessel either to a point of rest in storage or to a railroad car, and vice versa. *Ford*, 444 U.S. at 71. Claimant Ford simply moved the military vehicles from the holding area to the flatcars. Claimant Bryant was working as a cotton header in the Port of Galveston, Texas, responsible for unloading bales of cotton from a wagon into a pier warehouse. The cotton arrived at the port from inland shippers and was placed into storage. From there, the cotton moved by wagon to a pier warehouse where cotton headers were responsible for unloading and storing it. Longshoremen would then transfer the cotton from the pier warehouses onto the ships. Like the warehousemen, cotton headers were precluded from moving cotton directly from shoreside transportation to the ships, and vice versa. *Id.*, at 71-72. The Supreme Court held that both claimants "engaged in the type of duties that longshoremen perform in transferring goods between ship and land transportation." *Ford*, 444 U.S. at 81.

The Court reasoned that because the advent of containerization permitted loading and unloading tasks traditionally conducted aboard ships to be performed on land, the definition of "employee" covered by Section 2(3) had to change in accordance with the congressional intent to include those "working as part of the traditional process of moving goods from ship to land transportation." *Id.*, at 75; *see Caputo*, 432 U.S. 249. According to the Court, that means individuals like Ford and Bryant, whose work was shifted landward by the use of containers, "engaged in intermediate steps of moving cargo between ship and land transportation," and they were thus covered by §2(3). *Ford*, 444 U.S. at 83. The Court explained further that if the cargo both men were moving had been brought directly from the ship to the land transportation, their

[19] Thus, Employer erroneously argues that when considering the portion of cargo handled by its employees that does in fact come from ships, only the P&O workers would be covered by the Act because only they move the cargo directly between the ships and the rail yard. Brief of the Employer, at 33.

tasks would have been performed by longshoremen. The only basis for distinguishing Ford or Bryant from "longshoremen who otherwise would perform the same work is the point-of-rest theory"—which has been clearly rejected by the Court. *Id.*, at 82.[20] As the Court made clear, Congress did not intend to exclude those individuals, like Bryant and Ford, so directly involved in the process.

In the instant case, Claimant's work is undeniably similar to that of Bryant and Ford. Like the claimant's in *Ford*, Claimant here was responsible for performing work traditionally delegated to longshoremen—that is, moving cargo from ship to land transportation.[21] Like Ford and Bryant, Claimant did not move cargo directly from trains to ships and vice versa. And, like Bryant and Ford, Claimant was responsible for getting ship-carried cargo to a means of land transportation. Thus, under *Ford*, Claimant—even with only an occasional load of cargo from ships—was "as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." 444 U.S. at 83. In other words, Claimant was engaged in "intermediate steps" of moving cargo between ship and land transportation. *Id.*, at 83.

Employer argues that Claimant is "no different than truck drivers and train drivers who take the cargo inland." Brief of the Employer, at 35. I disagree. The Supreme Court made a clear distinction between those engaged in intermediate steps of moving cargo between ship and land, and other workers in the situs area. *Ford*, 444 U.S. at 83. Specifically, the Court in *Ford* noted that "there is no doubt…that neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment." *Id.* Such individuals, unlike Claimant here, are responsible only for "pick[ing] up stored cargo for further trans-shipment." *Id.* To the contrary, Employer's workers are clearly operating within the stream of maritime commerce and longshoring operations like Ford and Bryant. *See generally McKenzie*, 36 BRBS 41, 2002 WL 937755 (Board held that a truck driver was not covered by the Act since he was involved in landward transportation; and he was not involved in the intermediate steps of placing cargo onto, or removing it from, a vehicle of land transportation). Thus, Claimant is clearly distinguishable from truck drivers and train engineers who operate not in the intermediate steps in moving cargo between ship and land transportation, but instead to start it on its overland journey. *Id*.

---

[20] Stated another way, "Longshoremen…would have performed the work done by Bryant and Ford had the cargo moved without interruption between land and sea transportation." *Ford*, 444 U.S. at 82.

[21] Contrary to Employer's argument, the fact that only a small portion of the cargo moved by its workers comes from ships is immaterial here. As the Supreme Court explained, Congress' intent was to create uniform coverage that would not depend on whether the individual was walking in and out of coverage. Rather, "Congress…counted as 'longshoremen' persons who spend at least some of their time in indisputably longshoring operations." *Ford*, 444 U.S. at 75 *citing Caputo, 432 U.S. at 273* (internal quotations omitted). According to the operations manager's testimony here, neither he nor Employer's workers know where cargo goes or from where it comes—but some arrives by ship. Surely, Congress and the Supreme Court did not intend workers to fall in and out of coverage as the day goes on depending on which load of cargo they happened to pick up and place onto a train. Thus, under the Supreme Court's and Fourth Circuit's interpretations, the Claimant here was covered by the Act whether at the time of the injury he was moving a load of cargo that arrived by ship or not. *See In Re CSX Transportation, Inc.*, 151 F.3d 164 (4th Cir. 1998) (held that a worker who engages in unloading activity 15% of the time, but was not engaged in maritime activity at the time of his injury, is nevertheless "covered" under the Act: "While the status test properly inquires whether the employee was engaged in maritime employment at the time of his injury, this does not mean that his particular duties at the time of injury needed to be maritime in nature. Rather, the status test turns on whether the employee's occupation at the time of injury was maritime.").

As support for its contention, Employer relies on *Zube v. Sun Refining and Marketing Co.*, 31 BRBS 50 (1997), equating Claimant's work with that of a tanker-truck driver responsible for transferring petroleum from a storage tank on terminal grounds to service stations located throughout New Jersey. However, a brief examination of the facts here demonstrates that Employer's reliance on *Zube* is misplaced. In *Zube*, the Board determined that the claimant's duty of filling his truck with petroleum was not a step in the loading process, and thus was different from the claimants in *Ford*, who were performing the first and last steps in moving cargo from ship to land transportation and vice versa. 31 BRBS at 52. Claimant here was performing either the first or last step—depending on which direction the cargo was moving—in the process of maritime commerce. Unlike the claimant in *Zube*, Claimant did not transport cargo over land, but performed an essential intermediate step in moving cargo between land and water. In denying status coverage in *Zube,* the Board acknowledged that "maritime employment" is not limited to the occupations specifically enumerated in §2(3), but the employment "must be an integral or essential part of the chain of events leading up to the loading, unloading, building or repairing of a vessel." *Id.*, at 51.

Based on the foregoing, I find that the situs and status tests are satisfied, and Claimant is thereby covered under the provisions of the Act.

Causation

Claimant seeks permanent disability compensation for his current right shoulder impairment, contending that the problem he is experiencing with his right shoulder is causally related to his July 12, 2000 injury. Employer admits that the July 12, 2000 injury caused disability to Claimant's right arm, but denies a permanent injury to Claimant's right shoulder as a result of the injury. Specifically, Employer contends that it has sufficiently rebutted the presumption under Section 20 of the Act. For the following reasons, I agree with the Employer and find that Claimant's current right shoulder condition is not causally related to his July 12, 2000 injury.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw her own inferences from the evidence. *Wendler v. American National Red Cross*, 23 BRBS 408, 412 (1990). It is also well-established that the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989) *citing Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

The Act provides a presumption that a claim comes within its provisions. *See* 33 U.S.C. §920(a). However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a *prima facie* case. According to the United States Supreme Court, a *prima facie* claim for compensation must at least allege an injury that arose in the course of employment as well as out of employment. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). A claimant's credible subjective complaints of pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). Once this *prima facie* case is established, the presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Kier*, 16 BRBS 128.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Industries*, 455 U.S. at 615. The Board and Courts have described the meaning of "injury" in fairly broad terms. The Board has held that "if something unexpectedly goes wrong within the human frame, even if this occurs in the course of usual and ordinary work, claimant has sustained an accidental injury under the Act." *McGuigan v. Washington Metropolitan Area Transit Authority*, 10 BRBS 261, 263 (1979); *see also Wheatley v. Adler*, 407 F.2d 307, 311 n. 6 (D.C. Cir. 1968). In other words, the Act does not require a showing of unusual stress or exposure to anything more than the ordinary hazards of living and working. *Wheatley*, 407 F.2d at 311.

Based on the following, I find that the Claimant has established that he sustained physical harm or pain while working for Employer on July 12, 2000, as the result of an "accident or injury" that conceivably could have caused the current harm or pain to his shoulder. Claimant testified, and the medical reports reflect, that he was injured when a hose violently struck his right leg, arm, and shoulder. Having had the opportunity to observe the Claimant at the hearing, I find his testimony credible and consistent with the medical evidence of record. In fact, the initial injury reports indicate that Claimant suffered a contusion to his right shoulder when the hose struck him at work. Additionally, Dr. Pollak testified that Claimant likely suffered a contusion to the shoulder at the time of the injury to his right arm. There is ample evidence of record to find that conditions existed at Claimant's work which could have caused the harm to his shoulder. Thus, I find that the Claimant experienced some physical harm to his shoulder while working on July 12, 2000 sufficient to establish a *prima facie* case under the Act. Accordingly, Claimant is entitled to the statutory presumption under Section 20(a). The burden now shifts to Employer to establish that the Claimant's shoulder condition was not caused or aggravated by his employment.

To rebut the presumption, the party opposing entitlement must present "substantial evidence" proving the absence of or severing the connection between such harm and

employment or working conditions. *Kier*, 16 BRBS at 129; *Parsons Corp. of California*, 619 P.2d at 41; *Butler*, 363 F.2d at 683; *Ranks*, 22 BRBS at 305; *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *Noble Drilling v. Drake*, 795 F.2d 478 (5th Cir. 1986); *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996). If an employer presents "specific and comprehensive" evidence sufficient to sever the connection between a claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *See, e.g.*, *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 102 (1986); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2d Cir. 1981).

The record here contains only a few physicians' opinions that address the issue of causation and the Claimant's shoulder condition. The record is clear that Claimant has suffered from some type of shoulder impairment for some time. Indeed, in March of 1999, Dr. Matz examined Claimant after complaints of shoulder pain, and stated that Claimant had full range of motion, with mild pain at the extremes. After the July 12, 2000-injury, Dr. Pollak, Dr. Carlton, Dr. Riederman, and Dr. Shetty concluded in one form or another that Claimant had the signs of shoulder impairment. The question, however, is whether Claimant suffers from a permanent shoulder disability as defined by the Act, which is due to the July 12, 2000 incident. For the following reasons, I find that the Employer has provided substantial evidence severing causation.

In support of its rebuttal position, Employer relies heavily on Dr. Pollak's opinion that Claimant's shoulder pain and limited range of motion are due to a degenerative condition already in existence at the time of the July 12, 2000 incident. Dr. Pollak examined the Claimant three times after his injury. After an extensive review of Claimant's medical history, Dr. Pollak provided a detailed explanation as to how Claimant's degenerative shoulder impingement syndrome has been worsening over the years to its current point, but he stated that the Claimant's shoulder condition was not caused or aggravated by the July 12, 2000 injury. Indeed, two other physicians of record concurred with Dr. Pollak's assessment. The record contains nothing in the form of live testimony or medical opinion that undermines Dr. Pollak's conclusion.

Claimant argues that Dr. Matz did not find impingement syndrome in 1999, and thus, it must have been the result of the 2000 accident. However, Dr. Pollak thoroughly explained that impingement syndrome begins with symptoms of pain at the extremes of motion, which is precisely what Dr. Matz found one year before the July 12th accident. From there, according to Dr. Pollak, impingement syndrome progresses slowly over time to reach the point at which Claimant is now—that is, severe limited range of motion. In other words, Claimant's medical history suggests that his symptoms have followed the expected path of impingement syndrome as explained by Dr. Pollak.

I afford great weight to Dr. Pollak's opinion, as I find that it is well-reasoned and consistent with the medical evidence of record, and that Dr. Pollak is a highly qualified and experienced orthopaedic surgeon. Therefore, I find that Employer has provided substantial evidence sufficient to sever the causal connection between the Claimant's shoulder condition and his employment. Consequently, I must consider the evidentiary record as a whole without the aid of the presumption to determine whether Claimant's shoulder impairment was caused by the July 12, 2000 incident.

The burden of proving disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). When a claimant sustains a work-related injury, that injury need not be the primary factor in the resultant disability for compensation purposes. *See generally Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). If a work-related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). In support of his position, the Claimant relies on Dr. Carlton's findings. Dr. Carlton, who is a hand surgeon, supplied a very brief and vague conclusion regarding the cause of the Claimant's shoulder impairment. In his August 18, 2003 report, Dr. Carlton simply noted the extent in degrees that Claimant could move and rotate his right shoulder, and concluded that he suffers from "right shoulder impingement syndrome," which is exactly what Dr. Pollak found. However, with virtually no explanation, Dr. Carlton concluded that "from the above injuries," Claimant suffers from shoulder impingement syndrome; and "solely because of the above noted injuries and considering these findings, including pain, swelling, numbness, lack of endurance, loss of range of motion, weakness, vascular insufficiency and ulnar neuropathy, Mr. Stepek in unable to perform the essential functions of his current job."

As a plain reading of the report demonstrates, Dr. Carlton offered no specific finding as to whether Claimant's shoulder impingement syndrome was due to or exacerbated by the July 12, 2000 injury; instead, he simply concluded that a number of symptoms prevent Claimant from returning to his usual employment, and noted that "the above injuries" caused his condition. But in the report, Dr. Carlton discussed two injuries that have been documented throughout the record without specifically stating which injury caused or exacerbated which impairment. Instead, he lumped all of the injuries together, and concluded that all of the injuries caused all of the problems Claimant is experiencing with his right upper extremity as a whole. In short, there is no explanation or conclusion offered by Dr. Carlton that Claimant's shoulder impairment is due to the July 12, 2000 incident; or if it is, to what extent. And indeed, no other physician of record has concluded that Claimant's shoulder impairment is causally related to the July 12, 2000 incident.[22]

Dr. Pollak, on the other hand, has provided a more thorough and well-reasoned explanation for Claimant's shoulder impairment that is consistent with the other medical evidence of record. Indeed, his explanation that Claimant's right shoulder contusion resolved, and that any current problem is the result of a degenerative condition, is consistent with the other medical reports submitted into the record. As Dr. Pollak points out, his findings in December of 2002 are virtually identical with Dr. Matz's of 1999; had a shoulder contusion contributed to Claimant's current shoulder problem, Dr. Pollak would have found symptoms different than those reported by Dr. Matz *before* the incident. And, because the initial injury reports from Johns Hopkins indicate that Claimant's right shoulder contusion was "improving" within just one

[22] It is also important to note that there is nothing in the record suggesting that Claimant was unable to perform his duties as a crane operator or fifth-wheel driver for Employer *because of* his shoulder. Instead, the record is clear that Claimant's "disability" as defined by the Act is due solely to the condition of his right forearm and hand. In other words, Claimant has not demonstrated an inability to earn wages because of his right shoulder. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991).

week, (CX 6), it is reasonable to conclude—as Dr. Pollak has—that Claimant's contusion completely resolved by December of 2000. Additionally, Dr. Riederman reported that Claimant's right shoulder was improving with physical therapy, and Claimant had told him that the motion of his shoulder was "okay" as early as August 2000. Now, the Claimant demonstrates right shoulder symptoms that, according to Dr. Pollak, are no more than the natural result of a degenerative shoulder impingement syndrome. There is nothing in the record to directly refute Dr. Pollak's conclusion. In fact, Drs. Shetty and Riederman concurred with Dr. Pollak's findings.

Finally, while I acknowledge the impressive credentials of Dr. Carlton, I credit Dr. Pollak's conclusion as an orthopaedic surgeon who regularly examines and operates on shoulders. In addition, Dr. Pollak had the opportunity to personally examine the Claimant three times, while Dr. Carlton examined him only one time, three years after the incident. In sum, Dr. Carlton's opinion lacks the precision and substantiation necessary to establish by a preponderance that the Claimant's shoulder impairment is due to the July 12, 2000 injury. Thus, I have credited Dr. Pollak's conclusion over that of Dr. Carlton. Consequently, I find that the Claimant does not suffer from a shoulder disability under the Act, and is thus not entitled to compensation for his shoulder impairment.

Extent of Right Upper Extremity Disability

The parties have stipulated, and the record supports the conclusion that Claimant suffers from a 53% permanent disability impairment to his right arm as a result of the July 12, 2000 injury. Thus, it remains to determine the extent of that disability—i.e., whether Claimant's disability is partial or total.[23]

The Claimant bears the burden of proving the extent of his disability. *Trask*, 17 BRBS at 59. The question of extent of disability is an economic as well as a medical concept. *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). If the employee establishes his *prima facie* case, the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Should the employer fail to satisfy its burden, the extent of a claimant's disability will be deemed total. *See Blake v. Bethlehem Steel Corporation*, 21 BRBS 49 (1988).

Initially, there is some question as to whether Claimant is now capable of returning to his usual employment. The Claimant need not establish that he cannot return to *any* employment,

[23] It should be noted that Employer does not contest the fact that Claimant was temporarily and totally disabled immediately following the injury. The parties also stipulated that Claimant reached maximum medical improvement on August 18, 2003. Also, the record is clear that Claimant returned to his regular employment with Employer well before the date of maximum medical improvement, and remained until he retired. The current inquiry is thus limited to whether Claimant is able to return to his usual employment since retiring on September 29, 2003.

but only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). Employer contends that the Claimant can perform his regular duties as a crane operator because no physician or medical provider removed him from the job, and because Claimant worked 10+ hours a day 22 times in the six months before he retired. I disagree, and find that the great weight of the evidence suggests that Claimant cannot perform his usual employment.

A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980); *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978). In addition, a claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it is supported by the evidence. *Mijangos*, 948 F.2d at 945.

The record here contains credible testimony from the Claimant regarding his impaired ability to perform activities required of a crane operator or fifth-wheel driver.[24] Specifically, Claimant, and his co-workers and supervisors, testified that, for as long as they could remember, the Claimant's right arm swelled after he worked for even a very short period. Claimant's testimony—that any repetitive movement or activity causes his right arm to swell in pain—is clearly consistent with the medical evidence of record. And there is no question that operating the crane or fifth-wheel requires the use of both hands. As a result, in May of 2003 Claimant became incapable of completing a shift on a crane without his arm swelling in pain.[25] Even Ceres' operations manager, who was called to testify on behalf of the Employer, testified that when he did actually see Claimant working, his right arm was swollen.

Additionally, the medical reports contain substantial evidence from which the Court can reasonably conclude that the Claimant's injury has rendered him unable to perform his usual employment. From the time of his initial examination after the July 12, 2000 injury, Claimant was told to return to work with restrictions. Dr. Pollak testified that, while Claimant could likely perform the crane operating duties in a limited capacity, it might be difficult for him to do it consistently and frequently. Likewise, Dr. Zimmerman advised the Claimant to take time off of work because of his forearm pain and swelling. Eventually Claimant was told to work on a more restrictive basis—that is, to work until the pain and swelling was intolerable and take rests as needed.[26] Dr. Carlton opined simply that Claimant is unable to perform the essential functions of his current job. And, by late 2003, Dr. Shetty concluded that Claimant "is no longer to perform

[24] I do not agree with the Employer's assessment that Claimant was not a credible witness. The fact that the record contains logs indicating that the Claimant worked more than 10+ hours 22 times in the six months before he retired, does not mean that the Claimant's subjective complaints of pain are not credible. The hour logs, for example, do not indicate how much pain Claimant endured during that time, or how productive he was, or how many times he had to stop due to the pain as instructed by his physicians. In short, I find Claimant's testimony to be credible and consistent with the evidence of record.

[25] Claimant testified that he was able to operate a crane without much difficulty up until four months before he retired. (Tr. 33).

[26] See Dr. Zimmerman's and Dr. Eder's reports.

his duties as a longshoreman." Finally, there are countless references in the medical records to Claimant's "claw deformity" of his right hand, and the swelling that persists as a result of overuse that, when read with the physicians' instructions, suggest the Claimant is incapable of performing the tasks of his usual employment without restrictions. *See Haughton Elevator Service Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840, 841 (1st Cir. 1940) ("There is no actual inconsistency between a man being totally disabled for the purposes of the Longshoremen's and Harbor Workers' Compensation Act, and possessing a present ability to do work of a very limited nature."); *Seals v. Ingalls Shipbuilding, Div. of Litton Sys.*, 8 BRBS 182, (1978) (sporadic post-injury work does not rule out permanent total disability).[27]

The record does suggest that Claimant is capable of performing a variety of tasks despite his condition. However, it is also clear that Claimant is limited in the amount of weight he can lift, and the amount of time he can perform repetitive tasks. The record clearly shows that operating a crane or fifth-wheel involves repetitive tasks of pushing and pulling—something even Dr. Pollak advised Claimant to avoid.[28] The videotape is clear that the specific tasks of a crane operator are performed at a rapid pace for a sustained period. Also, the Claimant testified, and the evidence of record reflects, that he continues to suffer from pain, numbness, and swelling—a combination that has now left him unable to work. And, any restrictions placed upon Claimant by the physicians of record, along with Ms. Alberti's restriction of 20-30 lifts per shift, are inconsistent with the duties of a general longshoreman, as described by the Claimant. Moreover, I had the opportunity to observe Claimant's right arm closely at the hearing, and there is no reasonable way to conclude that Claimant is capable of doing much of anything with his right arm, let alone operate a crane for 8 hours.[29]

Based on the totality of the record, I find that Claimant's work-related injury to his right arm precludes his return to his usual employment as a crane operator. The burden thus rests upon Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Rinaldi*, 25 BRBS 128, 131 (Holding: A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment).

---

[27] Thus, the fact that Claimant attempted—albeit unsuccessfully—to the drive fifth-wheels and cranes for a short period before his retirement does not alone establish that Claimant is able to perform his usual employment. In fact, there is direct testimony acknowledging that Claimant attempted to operate a crane and fifth-wheel many times before retiring, but was unable to complete the shift because of his right arm.

[28] Although Employer argues that the tasks of operating a crane are relatively easy, Dr. Pollak concluded that Claimant's swelling and pain are the result of "repetitive tasks" or "activities" with the right hand, without any reference to the amount of force it takes to perform those tasks.

[29] Ms. Alberti concluded back in April of 2003 that Claimant could return to work with restrictions; namely, that Claimant perform no more than 20-30 lifts as a crane operator. However, Claimant testified that he usually performed that many in an hours time. Such a restriction is difficult to reconcile with Employer's contention that Claimant is capable of returning to his "usual employment." Moreover, the record reflects that Claimant's forearm pain and swelling has worsened since Ms. Alberti's evaluation. Thus, telling Ms. Alberti that he could operate a crane in April of 2003 is not inconsistent with Claimant's testimony that his ability to operate a crane worsened 4 months before he retired in September 2003.

Suitable Alternate Employment

In order to meet its burden, Employer must show the availability of job opportunities within the geographical area in which Claimant was injured or in which Claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981); *see Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765, 10 BRBS 81, 86-87 (4th Cir**.** 1979). Here, both Employer and the Claimant introduced evidence in the form of vocational expert testimony, Functional Capacity Evaluation ("FCE") reports, and vocational assessment reports. First, in April 2003, Ms. Alberti completed a FCE, in which she examined specifically whether Claimant could perform his duties as a *fifth-wheel driver*.[30] Nevertheless, she did provide information valuable to the issue of suitable alternate employment. For example, Ms. Alberti reported that Claimant suffered from isolated compartments of swelling of the right forearm following activity. (CX 19).

Ms. Mason conducted a vocational assessment after meeting with the Claimant and reviewing his FCE. After contacting a number of potential employers, Ms. Mason determined that Claimant was physically and mentally capable of performing a number of light-to-sedentary positions that pay $6-$11 per hour, and were available in September 2003 when Claimant retired due to his disability. In addition, Ms. Mason provided three addendums to update and refine her initial report. I find Ms. Mason's reports to be detailed and comprehensive; overall, her work product is well-tailored to this particular Claimant. The labor market surveys include detailed descriptions of the wages, physical demands, and necessary experience for the listed positions.

However, I do not agree with Employer that the Claimant is physically capable of performing each and every position listed by Ms. Mason. Her reports do not completely take into account the medical opinions of record, but instead rely too heavily on the findings contained in the FCE, which was performed specifically to determine whether Claimant could perform the duties of a *fifth-wheel driver* back in April 2003. For example, the medical opinions—in particular Dr. Pollak's—specifically state that the Claimant's right arm swells with pain after repetitive activity, not necessarily from occasional overhead reaching or heavy lifting. Ms. Mason's report focuses on heavy lifting and overhead reaching as opposed to the frequency in which Claimant would be required to use his right arm and hand. Ms. Mason did not adequately consider the full extent of Claimant's physical limitations, and particularly, his inability to perform any type of repetitive task as indicated by Dr. Pollak.

Mr. Smolkin's reports and conclusions of July and September of 2004 are also reasonable, yet very different from Ms. Mason's. Mr. Smolkin reviewed Dr. Carlton's and Dr. Shetty's medical reports, interviewed the Claimant, and spoke with many of the employers on Ms. Mason's list. He concluded that because Claimant has inferior fingertip dexterity with the right hand, he has inadequate skills to perform entry level positions requiring dexterous use of the fingertips. Thus, according to Mr. Smolkin, Claimant is certainly not able to perform *any* of the jobs recommended by Ms. Mason. Like Ms. Mason's, I find Mr. Smolkin's reports to be

[30] I acknowledge here that the parties have stipulated that Claimant is incapable of returning to work as a fifth-wheel operator.

reasonably thorough. But, while Mr. Smolkin adequately considered all of the Claimant's physical restrictions in making his determinations, including his inability to perform repetitive tasks, Mr. Smolkin did not take into account the actual duties required of some of the particular positions recommended by Ms. Mason. Thus, while Ms. Mason provided an overly optimistic description of Claimant's abilities, Mr. Smolkin painted an equally restrictive and unrealistic picture of Claimant's actual ability to perform jobs. In other words, although both vocational experts have submitted reasonable conclusions at opposite ends of the spectrum, I find that Claimant's ability to perform certain jobs actually falls somewhere in the middle.

Thus, contrary to Employer's assertion, I find that Claimant is incapable of performing the jobs of assembler and fast-food cashier.[31] An assembler, as described by Ms. Mason, certainly must use and rely on the dexterity of both hands repeatedly—something the Claimant clearly cannot do full-time. Likewise, a fast-food cashier is required to perform multiple tasks for a sustained period that require the repeated use of both hands: packing food, cleaning, stocking food, and delivering orders. I disagree with Employer's comment that since the FCE from April 2003 indicates Claimant can lift 30 lbs. from the floor, he can certainly lift a McDonald's quarter pound burger, and thus can perform the duties of a cashier. There is not much doubt that Claimant can lift a quarter-pounder. But this does not account for the fact that Claimant would not be able to perform such a task repeatedly, not to mention the many other tasks a fast-food cashier is required to perform. I note that Dr. Pollak, despite testifying that he "thinks" Claimant could work at McDonalds', concluded that Claimant cannot perform *any* repetitive task with his right arm. The description of duties by Ms. Mason makes it clear that fast food cashiers perform multiple tasks with both hands for a sustained period. Any conclusion to the contrary simply defies common sense, and is inconsistent with the evidence of record.

Nevertheless, I find based on the totality of the evidence of record that the Employer has met its burden of establishing suitable alternate employment. Claimant is sufficiently physically capable of working as a parking lot attendant[32] or auto parts counterperson, and Employer has established that those positions were available in Baltimore on September 29, 2003—the date of Claimant's retirement.[33] Unlike a cashier or assembler, a parking lot attendant or counterperson

[31] Claimant is also incapable of securing a position as a security guard. As mentioned above, Claimant's criminal record precludes him from securing that position. Employer urges this court to estop Claimant from relying on his criminal record as a factor. The fact remains, however, that Claimant's criminal record is an obstacle in landing certain employment. By considering Claimant's conviction here, the Employer has not been significantly prejudiced in its ability to establish suitable alternate employment. Indeed, there is no indication that Claimant lied or deliberately withheld information during his interview with Ms. Mason. Although it appears that Claimant's counsel may have intimidated Ms. Mason from inquiring further, the fact that Ms. Mason failed to press Claimant on the issue is not reason enough to preclude his criminal record as a factor in determining suitable alternate employment.

[32] Claimant testified that the parking lot supervisor told him "too much walking [is] involved and that they didn't hire anybody they couldn't bond." (Tr. 152). However, Ms. Mason's August 2, 2004 supplemental labor market survey indicates that she contacted the employers on her original list, including the parking lots, and was told that Claimant past criminal convictions would not pose a barrier to landing a position. (EX 56).

[33] Contrary to Claimant's assertion in his post-hearing brief, Employer established suitable alternate employment well before March 19, 2004, when "Employer allegedly provided a labor market survey" to the Claimant. See Claimant's Brief, at 18 (November 10, 2004). Under the Act, a total disability becomes partial the "earliest date" on which the employer demonstrates "suitable alternate employment to be *available*", *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991)(emphasis added); not, as Claimant seems to argue, when Employer physically hands over a list of suitable alternate positions to the Claimant. The LHWCA does not act to obligate the Employer

is not required to perform repetitive tasks for any sustained period of time. Writing the occasional ticket, moving the occasional auto part, or handling money is clearly less strenuous than are tasks requiring constant activity with both hands. Ms. Mason's report is clear that the parking lot attendant position would not require the Claimant to park cars. The Claimant can take money, write tickets, or handle auto parts with one hand, and any activity that might require the use of both hands would cause minimal strain. Thus, I find that Claimant is physically and mentally equipped to perform the duties of a parking lot attendant or auto parts counterperson as described in Ms. Mason's report.

Claimant's Diligence and Willingness to Work

Because I find the existence of suitable alternate employment, the burden shifts back to the Claimant to establish that he attempted to secure the suitable alternate employment opportunities with reasonable diligence. *Trans State*, 731 F.2d at 202; *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir.1988). In other words, the Claimant must have been genuinely seeking work while demonstrating a willingness to work. *See id.*; *Turner*, 661 F.2d at 1043. If the Claimant cannot satisfy this burden, then at the most, his disability is partial and not total. *See* 33 U.S.C. §908(c); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In the instant case, the Employer contends that the Claimant did not diligently pursue suitable alternate employment; specifically, that Claimant did not apply to enough jobs to constitute diligence. For the following reasons, I agree with the Employer and find that Claimant has not established that he diligently sought employment and demonstrated a willingness to work.

While there is no minimum number of applications that must be submitted or inquiries that must be made in order for the Claimant to meet his burden, and while Claimant is not required to show that he tried to get the identical jobs the employer showed were available, the Claimant is required to establish that he was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Turner*, 661 F.2d at 1043; *see Palombo v. Director, OWCP,* 937 F.2d 70 (2d Cir. 1991). It is clear from the record here that Claimant did not make a reasonable attempt to secure suitable employment or demonstrate a willingness to work. First, it is important to note that after the Claimant retired from his longshore duties in September 2003, no

---

to place the Claimant in employment or even provide him with a list in order to establish suitable alternate employment. Thus, an employer is not obligated to supply such material to the Claimant unless requested during discovery—a procedural matter. An employer has the burden in front of the ALJ only of establishing the availability of suitable alternate employment. Any conclusion to the contrary would mean that no employer would ever establish suitable alternate employment before a claim for benefits is filed, or until there is a need to hand over a list of jobs to the Claimant. I am unaware of any authority establishing such a rule, and Claimant has not provided any. In *Rinaldi*, the Board made clear that an Employer cannot retroactively establish suitable alternate employment on the date of maximum medical improvement once suitable alternate employment is established. *Id.* The Board's holding, however, does not preclude an employer from ever establishing suitable alternate employment on the date of maximum medical improvement (e.g., should the date of maximum medical improvement also happen to be the date on which employer established that suitable alternate employment was available), but rather holds that suitable alternate employment is not established simply *because* Claimant reached maximum medical improvement. Nor does the holding remotely suggest that suitable alternate employment cannot be established earlier than the date on which Claimant actually received a labor market survey containing suitable jobs from the Employer, as Claimant contends.

physician of record told Claimant that he could not return to any work; Dr. Carlton and Dr. Shetty suggested only that Claimant not return to work as a longshoreman. Second, Claimant waited almost 8 months before applying for a single suitable position.[34] Then, from May of 2004 through June 16, 2004, Claimant applied for only four jobs. Of the 16 positions provided to Claimant through Ms. Mason's initial labor market survey, Claimant only applied to three of them. And, among those positions he sought out on his own, Claimant simply gave up on a few of them after receiving no reply. Waiting for an employer to act, however, is not reasonable diligence, and it certainly does not demonstrate a willingness to work. Moreover, it is also telling that of the 15 job inquires Claimant actually made, 11 were initiated just a few weeks before the hearing in this case.

According to the Claimant, he was unable to land any of the positions because of his physical and educational limitations. However, even though he testified that he visited with Salvo Auto Parts store and visited the Downtown Parking location to inquire about positions, Claimant has not demonstrated that he diligently pursued those or any other suitable positions. In fact, Ms. Mason found that despite Claimant's assertions to the contrary, the auto parts positions and the parking lot attendant positions were suitable given Claimant's physical limitations and his criminal background. Ms. Mason testified that after specifically asking an individual at another parking lot—Landmark Parking—whether Claimant's criminal conviction would prevent him from securing employment, she concluded that his conviction would not pose a barrier. Ms. Mason also obtained a written statement from Advanced Auto Parts store personnel indicating that a counterperson position is suitable for someone with the Claimant's disability and work restrictions. Thus, it is reasonable to infer that Claimant's cursory inquiry into those positions was less than diligent, as it is clear that a more thorough investigation into the positions would have shown that Claimant could in fact perform those duties.

Based on the foregoing, I conclude that despite Claimant's casual efforts, he has not attempted to secure suitable alternate employment with reasonable diligence or demonstrated a willingness to work. Consequently, I find Claimant's disability to be partial, not total.[35] Because Claimant suffers from a permanent partial disability to his right arm—a scheduled member of the body—Claimant's recovery is limited under §8(c).

Credit

[34] Claimant testified that he first began applying for jobs on May 15, 2004.

[35] I should also note that for simplicity purposes, it is clear from the record that at the time of maximum medical improvement, Claimant was working full-time for the Employer. This means, in addition to reaching maximum medical improvement, the Employer has established de facto suitable alternate employment at that time. *See* n. 32, *supra*, at 36. Thus, on August 18, 2003, Claimant was permanently and partially disabled for purposes of the scheduled award under §8(c). And, since Employer also established the existence of suitable alternate employment as of September 29, 2003 (when Claimant stopped working), the Claimant's disability was never removed from the §8(c) schedule. *See Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268 (1980)("PEPCO")(Supreme Court held that permanent partial disability to a scheduled member limits claimant's recovery to the schedule unless it is determined that claimant is totally disabled). In short, for purposes of the establishing the award granted herein, Claimant's scheduled permanent partial injury was triggered on August 18, 2003, and remained on the schedule beyond September 29, 2003, as it has not been determined that Claimant's disability is total.

Employer maintains that should Claimant be entitled to benefits under the Act, it is entitled to a credit for compensation Claimant previously received from the Employer for other previous injuries to his right arm under the Act. I agree. While the "aggravation rule" requires an employer to compensate an injured employee for the full extent of the employee's disability, including any preexisting disability that the work-related injury worsens, the "credit doctrine" operates to avoid double recovery by removing an employer from liability for any portion of an employee's disability for which the employee has actually received compensation under the Act. *Strachan Shipping Company v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Lindenberg v. I.T.O. Corporation of Baltimore*, 19 BRBS 233, 234 (1987) ("Credits for compensation actually received by claimant for prior injuries to the same body part are proper…"); *see also New Orleans Stevedores v. Ibos*, 317 F.3d 480 (5th Cir. 2003). In *Nash*, the Board developed this "extra-statutory" credit doctrine as a means to effectuate the purpose of the Act—that is, to preserve the presumption of compensability while encouraging injured workers to return as productive members of society. *Nash*, 317 F.3d at 518. Specifically, "[t]he *Nash* credit doctrine allows credit for the amount of a prior scheduled award, against a later scheduled award, based on a later injury to the same scheduled member."[36] *Ibos*, 317 F.3d at 486 *citing Nash*, 782 F.2d at 518-21. The Fourth Circuit, under whose jurisdiction this case arises, has not specifically addressed the Board's credit doctrine enunciated in *Nash.* Thus, the Board's ruling remains the controlling authority here.

While there is glaring discrepancy regarding the exact impairment ratings assigned to Claimant's previous injuries, *see infra*, the record is clear that Claimant has in fact received compensation based on those injuries. Thus, Employer is entitled to a credit for those payments. The parties have stipulated that as a result of the July 12, 2000 injury to his right forearm, Claimant suffers from a 53% permanent disability. As stated above, I find that Claimant's most recent work-related injury resulted in a permanent and partial disability. Thus, under *Nash*, since Claimant has actually received compensation for a prior scheduled award, and is now entitled to compensation for an injury to the same scheduled member, the Employer is entitled to a credit for the compensation paid for those previous scheduled injuries. In other words, Employer is liable for the entire 53% permanent partial impairment pursuant to the aggravation rule, less the amount Employer has actually paid to Claimant for the previous scheduled injuries pursuant to the credit doctrine.

Section 8(f)

Employer timely filed an application for §8(f) relief with the District Director on November 3, 2003. (EX 13). To date the District Director has not filed a brief or other response opposing Employer's application for §8(f) relief.

[36] Compare *Todd Shipyards Corporation v. Director, OWCP*, 848 F.2d 125, 127 (9th Cir. 1988), in which the Ninth Circuit held that §903(e) of the Act, which allows the crediting against an LHWCA award of any other workers' compensation benefits or Jones Act benefits, also includes credits for any LHWCA benefits awarded for a prior injury. Under *Todd Shipyards*, the result would nevertheless be the same. The difference is that the Ninth Circuit incorporates the *Nash* credit doctrine into §903(e) of the Act, while the Fifth Circuit in *Nash* described the doctrine as extra-statutory, separate from §903(e).

Under Section 8(f) of the Act and its implementing regulations contained at 20 C.F.R. §702.321, there are four prerequisites for employer eligibility for special fund relief: (1) the claimant must suffer from a pre-existing permanent partial disability; (2) the pre-existing condition must have been "manifest" to the employer; (3) the claimant must have suffered a new injury or aggravation of the pre-existing condition; and (4) the claimant's disability must not be the sole result of the new injury. *See* 33 U.S.C. § 908(f); *Lawson v. Suvanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982); *C & P Telephone v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977); *Shaw v. Todd Pacific Shipyards*, 23 BRBS 96 (1989). When the combination of a claimant's pre-existing disability and the new injury or aggravation results in permanent partial disability rather than permanent total disability, the employer must also establish that the resultant disability is materially and substantially greater than that which would have otherwise been expected. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175 (4th Cir. 1993); *Quan v. Marine Power & Equip. Co.*, 30 BRBS 124 (1996); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991).

The employer (or insurance carrier) bears the burden of establishing its eligibility for section 8(f) relief. *See* 20 C.F.R. § 702.321; *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982). If the employer carries this burden, its obligation is to provide compensation for the applicable prescribed period of weeks provided for in Section 8(f)(1) for the subsequent injury, or for one hundred and four weeks, whichever is the greater. After the employer's liability for compensation is discharged, further payments to the claimant are made by the Special Fund. The Special Fund is not liable for medical benefits or attorney fees.

As noted above, the parties have previously stipulated that before the July 12, 2000 injury at issue here, Claimant suffered from a permanent partial disability to his right arm. The precise impairment ratings upon which the compensation payments were based, however, are less than clear. The record contains three conflicting exhibits describing compensation due to Claimant for the two prior injuries to his right arm. Employer's Exhibit 54 contains a compensation agreement dated April 28, 1989 assigning a 22% impairment rating for Claimant's 1987 work-related injury to his right arm. The April 28, 1989 agreement is signed by the parties, and provides that Claimant was wholly disabled during periods from July 21, 1987 up until February 21, 1988. Employer's Exhibit 15 contains an "amended compensation order award of compensation" signed by the District Director dated October 10, 1997 assigning a 25% impairment rating to Claimant's right arm as a result of the 1994 injury.[37] Employer's Exhibit 12 contains a "Stipulation of Facts" signed by the parties dated May 6, 1999 which assigns an additional 12% impairment rating to Claimant's right arm, indicating that he has sustained a total of 37% impairment to the right arm as a result of the 1994 work-related injury. The Employer's post-hearing brief also indicates that Claimant had a 37% impairment rating before the July 12, 2000 injury at issue here. The May 6, 1999 agreement is accompanied by a "compensation order award of compensation" dated May 17, 1999 and signed by the Director, which also indicates Claimant suffered from a total 37% permanent partial impairment to his right arm as a result of the 1994 work-related injury.

[37] The record does not contain any order or agreement that the October 10, 1997 compensation order is "amending." Nor does the October 10, 1997 amended compensation order refer to any other document.

The problem with the figures as they are presented in the record is this: If the May 6, 1999 agreement—which indicates the additional 12% due to Claimant for the worsening of his condition—is in addition to the 1987 agreement that assigns the 22% rating to Claimant's arm, then the total rating should have been 34%, not 37%. The 25% figure—to which the parties presumably added the additional 12% in order to get 37%—is found only in the District Director's October 17, 1997 "amended" compensation order, and indicates that the 25% is the "further result" of the 1994 injury; which is very different from the 12% additional rating that was assigned as a result of the 1994 injury in the May 6, 1999 agreement. Obviously, the figures contained in these exhibits are incompatible and must be resolved by the District Director before the proper amount of 8(f) relief can be determined.

Nevertheless, Employer has established pursuant to §8(f) that Claimant suffered from a "pre-existing" disability that was "manifest" to the Employer. *see Esposito v. Bay Container Repair Co*., 30 BRBS 67, 68 (1996) (where the Board held that: "It is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable."). The outstanding question of what exactly the previous impairment rating was does not alter the fact that the Employer had actual knowledge of the pre-existing condition. Likewise, there is no dispute, and the record clearly establishes, that the Claimant suffered a new injury or aggravation of the pre-existing condition on July 12, 2000. Virtually every physician of record has opined that Claimant's pre-2000 right arm injuries contributed to his current right arm disability.[38] Thus, Employer has established that the Claimant's disability is not the sole result of the July 12, 2000 injury.

Finally, in cases of permanent partial disability, the Employer must also establish that the resultant disability is materially and substantially greater than that which would have otherwise been expected. In such a case, the employer need only show that an increased permanent partial disability resulted when the prior and subsequent injuries are combined. *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir. 1997). Here, the record is clear that since the July 12, 2000 incident Claimant now suffers from a 53% permanent partial disability to his right arm; the parties stipulated as much, and Dr. Pollack testified that Claimant now suffers from a 53% permanent impairment. When compared with Claimant's previous permanent impairment rating—whether it was 34% or 37%—it is apparent that his condition is "materially and substantially" greater than would have been expected had Claimant not been injured on July 12, 2000. Dr. Pollak testified, without opposition, that Claimant would have even been able to return to his duties as a *fifth-wheel* operator had it not been for the July 12, 2000 injury.

Based on the foregoing, I find that the Employer is entitled to §8(f) relief. 33 U.S.C. §908(f). Consequently, the Special Fund must assume responsibility for part of the Employer's obligation to pay compensation under the Act.

[38] In addition, the record is replete with pre-2000 injury medical reports acknowledging Claimant's claw-like hand deformity, his fixed right digits, and surgical procedures actually performed to fix his right arm injuries. Moreover, Dr. Pollak, whose testimony I afford great weight, stated that had Claimant had a normal right arm at the time of the July 12, 2000 injury, he would not now suffer from a permanent disability to the right arm because of the incident.

CONCLUSION

I find based on the record that Claimant's claim is covered by the Act under Sections 3(a) and 2(3). I also find that Claimant's current right shoulder condition is not causally related to the July 12, 2000 incident, and is thus not a compensable disability under the Act. Furthermore, I find Claimant suffers from a 53% permanent partial disability of his right arm—a scheduled member of the body under §8(c) of the Act. I find that the Employer is entitled to a credit under *Nash*—i.e., Employer is liable for Claimant's 53% permanent partial disability less any permanent partial disability compensation actually paid to the Claimant for his previous injuries to the right arm. And finally, Employer is entitled to §8(f) relief.

ORDER

On the basis of the foregoing, the Claimant's request for disability compensation is granted.

Employer shall:

A. Pay the Claimant temporary total disability compensation benefits from July 13, 2000 through August 18, 2003 based on an average weekly wage of $1,396.15.

B. The Employer shall receive credit for all amounts previously paid to Claimant as a result of his injuries of July 12, 2000, as well as a credit for any period of temporary total disability during which the Claimant worked for Employer.

C. Commencing on August 18, 2003, pay to Claimant compensation benefits for his 53% permanent partial disability of the right upper extremity under §8(c), based on an average weekly wage of $1,396.15.

D. The Employer shall also receive a credit for all amounts actually paid to Claimant as compensation for his two prior injuries (i.e., prior to the July 12, 2000 injury) resulting in permanent partial disability to his right arm.

E. Pay to the Claimant all medical benefits to which he is entitled under the Longshore and Harbor Workers' Compensation Act.

F. Pay to the Claimant's attorney fees and costs to be established by a supplemental order.

G. The District Director shall perform all calculations necessary to effect this Order.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge